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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-794

BARBARA SUSAN PAPISH,

Petitioner,

—v.—

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions, Statutes, and Regulations Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

Conclusion 10

Appendix

Opinion of United States Court of Appeals 1a

Order 21a

Judgment Denying Plaintiff Declaratory and Injunctive Relief; Judgment for Defendants 22a

Table of Authorities

Cases:

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966) 7

Cohen v. California, 403 U.S. 15 (1971) 7

Farrell v. Joel, 437 F.2d 160 (2nd Cir. 1971) 8

PAGE

Healy v. James, 408 U.S. 169 7,8

Lewis v. City of New Orleans, 40 U.S.L.W. 3614 7

Muskrat v. United States, 219 U.S. 346 (1911) 10

Rosenfeld v. New Jersey, 40 U.S.L.W. 3614 7
Roth v. United States, 354 U.S. 476 (1957) 7

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1970) 7-8

Statutes:

23 U.S.C. §1254(1) 1
42 U.S.C. 1983 4
U.S.C. Art. III, §2 10

Constitutional Provisions:

United States Constitution
First Amendment 2, 6, 9
Fourteenth Amendment 2

Miscellaneous:

University of Missouri By-Laws
Article V, Sections A and B 2, 4, 8

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THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered June 15, 1972.

Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 464 F.2d 136 and is set out in the appendix, *infra*, p. 1a. The opinion of the United States District Court for the Western District of Missouri is unreported and is set out in the appendix, *infra*, p. 22a.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 15, 1972. The petition for rehearing was denied on August 31, 1972 (App., *infra*, p. 21a). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. Whether the respondents violated the First Amendment by dismissing petitioner, a graduate student at a state university, under a university regulation prohibiting "indecent speech", on the sole ground that petitioner had distributed on campus a licensed student newspaper which contained material regarded as "indecent" by some university officials, but which the Court below did not find to be obscene?

2. Whether the District Court of the Western District of Missouri had the judicial power to issue the "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Learning," 45 F.R.D. 133 (1968), which purports to set forth substantive standards of conduct to be applied in all student rights cases arising in that Court?

Constitutional Provisions, Statutes, and Regulations Involved

This case involves the free speech clause of the First Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution. It also involves Article V, Sections A and B of the By-Laws of the University of Missouri, which provide as follows:

Article V—Student Body

A. The student body of the University of Missouri shall be comprised of all presently or hereinafter enrolled students. Such students are subject to classifications, as may be established from time to time by the President, or the Board of Curators, and shall be subject to such ordinances, rules, regulation and restrictions as may now

be established or hereafter from time to time established by the President or the Board of Curators.

B. Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. Obstruction of University teaching, research, administration or other activities, indecent conduct or speech, failure to comply with requests of University officials in the performance of their duties and violation of the laws of the city, state or nation are examples of conduct which would contravene this standard.

This standard applies to all forms of student conduct, and activity and registration as a student constitutes full acceptance of the fundamental standard as well as all other University rules and standards of conduct which may be adopted in implementation of this standard.

This rule of conduct shall be duly published and made available to all students enrolled in the University of Missouri.

Statement of the Case

In 1969 petitioner, Barbara Susan Papish, was a graduate student at the University of Missouri, Columbia campus, a state supported public university, where she was pursuing a program leading to a Master of Arts degree in journalism (J.A. 27a).[1] On February 19, 1969, a group of students, including petitioner, sold and distributed on the public sidewalks and thoroughfares of the Columbia campus

[1] J.A. refers to the Appendix filed in the Court of Appeals.

copies of the February 1969 edition of the "Free Press Underground", a newspaper which had been registered with the University and published for four years (J.A. 30a, 100a). There was no physical disturbance or disruption of University activities accompanying or resulting from this distribution of the newspaper (J.A. 31a).

The issue of the paper which was distributed by petitioner contained an article headlined "Motherfucker Acquitted", which concerned the trial of a member of a political group known as "Up Against the Wall Motherfucker" (J.A. 30a). The newspaper also contained, among other things, a cartoon depicting a group of policemen raping the Statue of Liberty and the Goddess of Justice (J.A. 30a).

As a result of distributing this issue of the Free Press Underground, petitioner was charged with violating Article V, §§A and B of the By-Laws of the University, which require students to "observe generally accepted standards of conduct" and which declares that the use of "indecent conduct or speech" is a violation of such standards.

After a hearing, the Student Conduct Committee of the University found that petitioner had violated the By-Law and ordered petitioner dismissed from the University (J.A. 31a). Petitioner appealed her dismissal to the Chancellor and the Board of Curators of the University, both of whom affirmed her dismissal (J.A. 31a-32a).

In September 1969, petitioner filed this suit under 42 U.S.C. 1983, seeking a permanent injunction reinstating her in the University and a declaratory judgment declaring that Article V of the By-Laws is unconstitutionally vague and overbroad (J.A. 2a-8a). Simultaneously, she moved for a preliminary injunction reinstating her to her former status as a graduate student (J.A. 21a-26a).

At a hearing before Chief Judge Becker of the District Court, petitioner submitted affidavits from members of the University faculty showing that the issue of the Free Press Underground had literary, artistic and social value, and that other publications containing four letter words were sold at the University bookstore and available in the University library (J.A. 46a-47a). With respect to the cartoon in issue, Professor Dan Bartlett of the University Art Department stated that:

> "The cartoon in question is a biting satirical depiction of the artist's view of police brutality and injustice. The obvious theme is political protest against police injustice and police interference with liberty. . . . This cartoon is very similar, although not of the same quality, as works of art by such well known figures as Goya, Rembrandt and Daumier, all of whom created works of social criticism with themes similar to that portrayed by this cartoon" (J.A. 47a).

On January 5, 1970, four months after the hearing, Chief Judge Becker issued a Memorandum stating, *inter alia*, that:

> "Under applicable standards of substance and procedure, including but not limited to those expressed in *Esteban* v. *Central Missouri State College* (C.A. 8) 415 F.2d 1077 and the *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133, a decision has been made to deny the claim of plaintiff for relief in this action" (J.A. 149a).

On May 7, 1971, a year and a half later, Judge Becker issued a decision in which he held (1) that petitioner had

no standing to maintain the action because she was a non-resident of Missouri, (2) that the Free Press Underground was legally obscene and (3) that petitioner's dismissal from the University did not violate her First Amendment rights (App., *infra*, pp. 22a-46a).

On June 15, 1972, the Court of Appeals for the Eighth Circuit issued an opinion (Ross, J., dissenting) which rejected the holding of Chief Judge Becker that petitioner had no standing to challenge her dismissal from the University, but affirmed Judge Becker's holding that petitioner's dismissal did not violate her First Amendment rights (App., *infra*, p. 1a).

The Court of Appeals did not find that the issue of the Free Press Underground distributed by petitioner was obscene. Rather, the Court held that the question of obscenity was not "relevant to disposition of the narrow issue before us", on the ground that:

> "... no provision of the Constitution requires the imposition of so high a value on freedom of expression that it can never be subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures on a University campus. *The Constitution does not compel the University to promote the vernacular of the gutter by allowing such publications as the one in litigation to be publicly sold or distributed on its open campus,* and this court will not now propound such a rule." (Emphasis added.) (App., *infra*, p. 16a.)

Judge Ross, dissenting, found that the real issue before the Court was whether the paper was "obscene." Concluding that "the cartoon and the headline, alone or together, cannot be characterized as legally obscene," he would have

ordered petitioner reinstated in the University (App., *infra*, pp. 17a-20a).

A few days after the Court of Appeals issued its decision, this Court handed down its opinions in *Healy* v. *James*, 408 U.S. 169, *Rosenfeld* v. *New Jersey*, 40 U.S.L.W. 3614 and *Lewis* v. *City of New Orleans*, 40 U.S.L.W. 3614. In light of these decisions, petitioner filed a motion for rehearing, or a hearing *en banc*. On August 31, 1972, the Court of Appeals issued an order denying, by a vote of four to four, petitioner's motion (App., *infra*, p. 21a).

Reasons for Granting the Writ

1. It is beyond dispute that the issue of the Free Press Underground distributed by petitioner was not legally obscene under the standards promulgated by this Court. See *Roth* v. *United States*, 354 U.S. 476 (1957); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966); cf. *Cohen* v. *California*, 403 U.S. 15 (1971). But despite the fact that the publication was fully protected by the First Amendment, petitioner was dismissed from the University of Missouri solely because she distributed it on campus.[2]

In upholding petitioner's discharge the Court of Appeals, in effect, held that a student can be discharged from a university for distributing constitutionally protected literature, on the theory that the constitutional rules governing publication of allegedly obscene material do not fully apply to college campuses. This holding by the Court of Appeals is contrary to the decisions of this Court in *Healy* v. *James*, *supra*, and *Tinker* v. *Des Moines Independent School Dis-*

[2] Petitioner raised below the claim that Art. V, §§A and B, *supra*, pp. 2-3, were vague and overbroad. She preserves that argument here should certiorari be granted.

trict, 393 U.S. 503 (1970), in which this Court has emphasized that the First Amendment is fully applicable on school campuses. As the Court stated in *Healy* v. *James*:

> "... [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'."

Since petitioner was dismissed solely because she distributed a constitutionally protected publication, her dismissal must be nullified.[3]

2. In September 1968, the District Court for the Western District of Missouri, *en banc*, "took the extraordinary step" (*Farrell* v. *Joel*, 437 F.2d 160, 162 (2nd Cir. 1971)) of issuing its "General Order" setting forth procedural and substantive standards to "be treated as applicable to cases in this Court wherein questions involving disciplinary action of students in tax supported institutions of higher learning are presented" (45 F.R.D. at 134). Paragraph 6 of the "General Order" provides that universities and colleges may:

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[3] The opinion of the Court of Appeals suggests that petitioner was dismissed because of the "manner in which she sought to exercise her rights" and not "for advocacy of her ideas". There is no basis in the record for this suggestion. Miss Papish was charged with violating the University By-Laws by distributing allegedly "indecent" material. Nothing in the charges against her referred in any way to the manner in which the publication was distributed, and the testimony at the school hearing and in the District Court focused entirely on the contents of the publication, and not on the manner of its distribution. Moreover, it was conceded that Miss Papish caused no disturbance whatsoever and that the paper was distributed on an area of the campus which was customarily used for distributing literature.

> "... require scholastic attainments higher than the average of the population and may require superior ethical and moral behavior. In establishing standards of behavior, the institution is not limited to the standards or the forms of criminal laws." (Emphasis added.) (*Id.* at 145.)

In short, the "General Order" grants universities the power to impose codes of "ethical and moral behavior" which a State would not be free, under the Constitution, to impose through the criminal law upon its citizens.

In the proceedings in the trial court, petitioner requested that this case be decided without reference to the standards set forth in the "General Order". However, in a "Memorandum to Counsel" issued before his decision, Judge Becker informed counsel that he had decided to reject plaintiff's claims for relief "under applicable standards of substance and procedure, including but not limited to those expressed in ... the General Order ..." (J.A. 149a). The decision issued therafter by Judge Becker explicitly relies upon the principle enunciated in the "General Order" that a university may require "superior ethical and moral behavior" on the part of its students.

In the Court of Appeals, petitioner contended that the District Court, *en banc*, had lacked power to issue the "General Order", that the standards contained in the "General Order" were repugnant to the First Amendment and, accordingly, that Judge Becker should not have relied upon the "General Order". The Court of Appeals stated in its decision that it found no support for the contention that Judge Becker had relied upon the "General Order" (App. *infra*, p. 9a, n. 10), and the Court of Appeals declined to rule upon the Order's validity. However, the fact that the trial judge was one of the authors of the "General Order", that he explicitly referred to it throughout his opinion,

and that he actually applied its standards in his decision,[4] squarely raises the question whether the adoption of the "General Order" exceeded the powers of the United States District Court for the Western District of Missouri, *en banc*. See U.S.C. Art. III, §2; *Muskrat* v. *United States*, 219 U.S. 346 (1911).

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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November 29, 1972.

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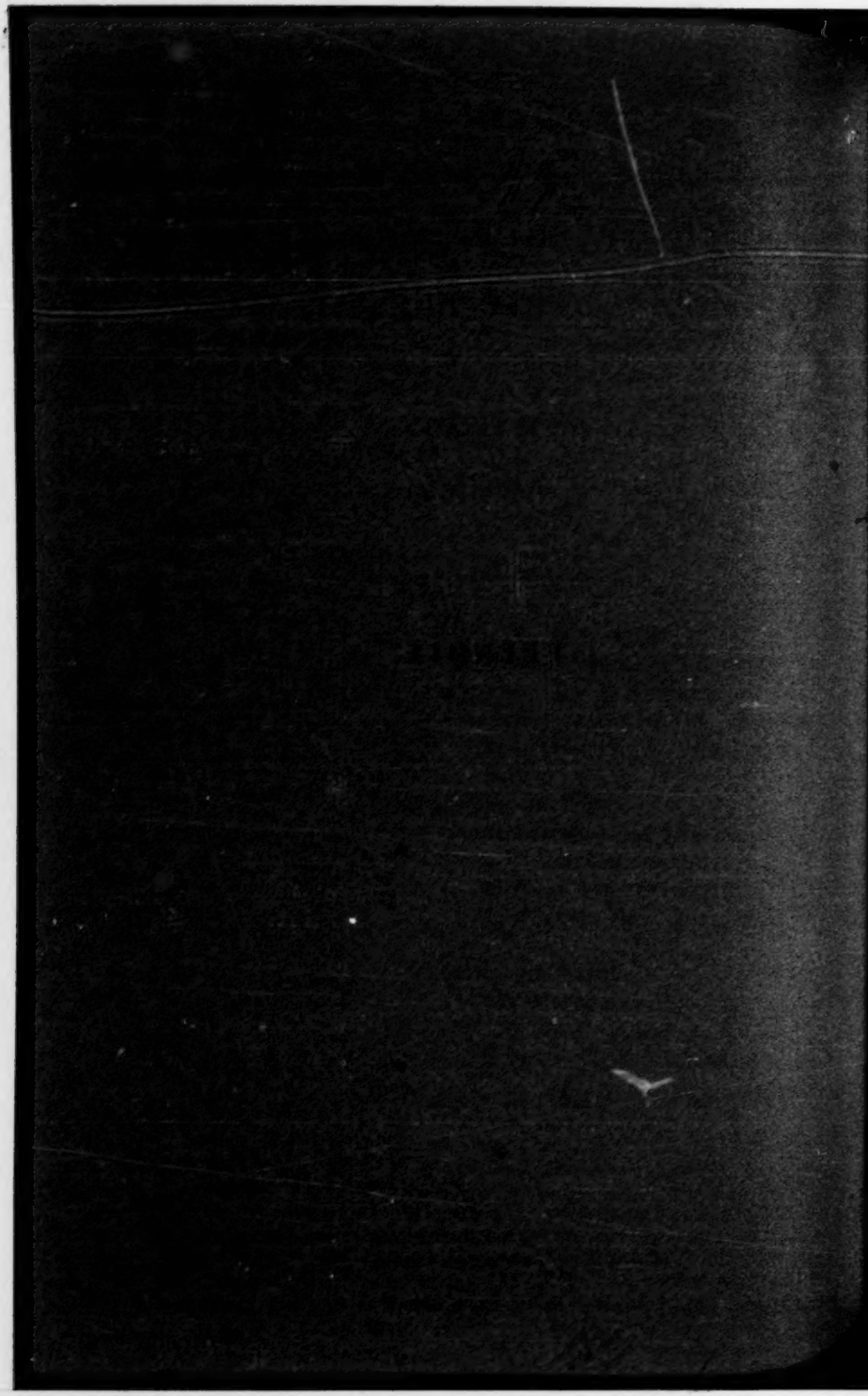
[4] J.A. 149a; App., *infra*, pp. 23a, 24a, 29a, 35a, 41a.

APPENDIX



Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

No. 71-1338

BARBARA SUSAN PAPISH,

Appellant,

—v.—

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Submitted: January 11, 1972.
Filed: June 15, 1972.

Before:

VAN OOSTERHOUT, *Senior Circuit Judge,* and
Ross and STEPHENSON, *Circuit Judges.*

STEPHENSON, *Circuit Judge.*

This is a student "rights" case. It provides yet another example of the imaginative and extensive litigation in this area which seems to have as its purpose the attainment of plenary judicial oversight of the administration of tax-supported educational institutions.[1] In the present case,

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[1] In recent years, the federal courts have been inundated with an avalanche of student lawsuits dealing with such issues as hair style regulations [see, *e.g., Torvik* v. *Decorah Community Schools,* 453 F.2d 779 (CA8 1972); *Bishop* v. *Colaw,* 450 F.2d 1069 (CA8 1971); and *Freeman* v. *Flake,* 448 F.2d 258 (CA10 1971)], campus demonstrations [see, *e.g., Esteban* v. *Central Missouri State College,* 415 F.2d 1077 (CA8 1969), certiorari denied 398 U.S. 965, and *Soglin* v. *Kauffman,* 418 F.2d 163 (CA7 1969)], student publications [see, *e.g., Norton* v. *Discipline Committee of East Tennessee*

the issue arises in the context of a student dismissal, after service of written charges and after a full and fair hearing, for violation of a University rule of conduct.

I

The facts are not in dispute. Barbara Susan Papish, then a 32-year-old graduate student[2] in the University of Missouri School of Journalism, Columbia campus, was, on June 6, 1969, dismissed from the University, effective March 26, 1969, on the ground that she violated paragraph

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University, 419 F.2d 195 (CA6 1969), certiorari denied 399 U.S. 906, and *Scoville* v. *Board of Education*, 425 F.2d 10 (CA7 1970)], speaker bans [see, *e.g.*, *Brooks* v. *Auburn University*, 412 F.2d 1171 (CA5 1969)], recognition of student organizations [see, *e.g.*, *American Civil Liberties Union of Virginia* v. *Radford College*, 311 F. Supp. 893 (WD Va. 1970)], access to the student paper [see, *e.g.*, *Lee* v. *Board of Regents*, 441 F.2d 1257 (CA7 1971)], and allegedly overbroad student conduct regulations [see, *e.g.*, *French* v. *Bashful*, 303 F. Supp. 1333 (ED La. 1969), aff'd *per curiam*, 425 F.2d 182 (CA5 1970) and *Barker* v. *Hardway*, 283 F. Supp. 228 (SD W. Va. 1968), aff'd *per curiam*, 399 F.2d 638 (CA4 1968) certiorari denied 394 US 905]. Additionally, this court recently dealt with a case in which a self-proclaimed homosexual was denied employment at a tax-supported University. *McConnell* v. *Anderson*, 451 F.2d 193 (CA8 1971), certiorari denied —— U.S. —— (No. 71-978, April 3, 1972). The forerunner of these cases is, of course, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) a case from this circuit. For an exhaustive analysis of these and other cases, see principally, P. G. Haskell, Student Expression in the Public Schools, 59 Georgetown Law Journal 37 (1970) and P. G. Haskell, Judicial Review of School Discipline, 21 Case Western Reserve Law Review 211 (1970).

[2] Miss Papish's academic record reveals that she was in no rush to complete the requirements for her graduate degree in Journalism. She possesses a 1958 academic degree from the University of Connecticut; she was admitted to graduate school at the University of Missouri in September 1963; and although she attended school through the fall, winter, and summer semesters, she was, after 6 years of work, making little, if any, significant progress toward the achievement of her stated academic objective. At the time of her dismissal, Miss Papish was enrolled in a one-hour course entitled "Research Journalism" and in a three-hour course entitled "Ceramics 4." In the semester immediately preceding her dismissal, she was enrolled only in "Ceramics 3."

B of Article V of the By-Laws of the University's Board of Curators. The Article reads, in pertinent part, as follows:

> "Paragraph B: Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. Obstruction of University teaching, research, administration or other activities, *indecent conduct or speech,* failure to comply with requests of University officials in the performance of their duties and violations of the laws of the city, state or nation, are examples of conduct which would contravene this standard. (Emphasis supplied).
>
> "This standard applies to all forms of student conduct and activity, and registration as a student constitutes full acceptance of the fundamental standard as well as other standards of conduct which may be adopted in implementation of this standard."

At the time of her dismissal, Miss Papish was on disciplinary[3] and academic[4] probation.

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[3] On November 1, 1967, the Faculty Committee on Student Conduct, after notice of charges and a hearing, placed Miss Papish on disciplinary probation for the remainder of her student status at the University. The basis for her probation was her violation of the general standard of student conduct embodied in Article V and set forth in the text. This action arose out of events which took place on October 14, 1967 at a time when the University was hosting high school seniors and their parents for the purpose of acquainting them with its educational programs and other aspects of campus life. She specifically was charged, *inter alia,* with openly distributing, on University grounds, without the permission of appropriate University personnel, two non-University publications of the Students for Democratic Society (SDS). It was alleged in the notice of charges, and apparently established at the ensuing hearing, that one of these

The facts of significance may be summarized as follows. By letter under date of March 12, 1969 Miss Papish was given notice by the Dean of Students of the University that she was charged with

"violating on, or about February 18 and 19, at Columbia, Missouri, the General Standard of Student Conduct as set forth in Article V, Sections A and B of the By-Laws of the Board of Curators by failing to conduct yourself in a manner compatible with the University's functions and missions as an educational instition, in the following particulars:

"[t]hat while you were on a status of disciplinary probation you distributed or aided in the distribution of the Volume IV, No. 3, February 1969 edition of the *Free Press Underground* containing forms of indecent speech, on the campus of the University of Missouri—Columbia, with knowledge of the contents of the publication, and with knowledge that the Dean of Students had previously declared the forms of speech, therein appearing, indecent, and distribution thereof

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publications, the *New Left Notes*, contained "pornographic, indecent and obscene words, 'f---,' 'bull s---,' and 'sh--s.'" The notice of charges also recites that the other publication, *The CIA at College: Into Twilight and Back*, contained "a pornographic and indecent picture depicting two rats apparently fornicating on its cover * * *."

[4] Some two weeks prior to the incident causing her dismissal, Miss Papish was placed on academic probation because of prolonged submarginal academic progress. It was a condition of this probation that she pursue satisfactory work on her thesis, and that such work be evidenced by the completion and presentation of several completed chapters to her thesis advisor by the end of the semester. By letter dated January 31, 1969, Miss Papish was notified that her failure to comply with this special condition within the time specified would result in the termination of her candidacy for a graduate degree.

improper on the University campus under existing rules and regulations." [5]

From the verified affidavit of Miss Papish it is revealed that

"[she] is a member of the staff of the 'Free Press Underground', a newspaper published by the Columbia Free Press Corporation, a non-profit corporation organized under the laws of Missouri. The 'Free Press Underground', which has been published since 1965, disseminates news and opinion of general interest about University, local and world affairs. The paper generally is published monthly during the school year, and is distributed on the University campus and elsewhere. Written permission to distribute the paper on campus was obtained from the Business Officer of the University on April 30, 1967 in accordance with University regulations.[6]

"On February 16, 1969, I and a number of other students took part in the distribution of Volume IV, No. 3, February 1969 edition of the 'Free Press Underground' on the Columbia campus of the University, in front of the Memorial Union. Although no disruption of the University's functions occurred in connection with the distribution of the newspaper, I and three

[5] Section A of Article V reads as follows

"The student body of the University of Missouri shall be comprised of all presently or hereinafter enrolled students. Such students are subject to classifications, as may be established from time to time by the President, or the Board of Curators, and shall be subject to such ordinances, rules, regulation and restrictions as may now be established or hereafter from time to time established by the President or the Board of Curators."

[6] This contention regarding University approval is supported by stipulation of the parties.

other students who were involved in its distribution were arrested, at the instigation of the University.[1]

"The February 1969 edition of the 'Free Press Underground' contained two features which the University later contended were 'indecent'. The front cover duplicated a political cartoon which appeared in the February 1969 edition of 'The Movement', a liberal paper of national circulation. The cartoon shows helmetted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice. The cartoon is captioned '. . . With Liberty and Justice for All.' *To me, the cartoon depicts and symbolizes the evils of authoritarian brutality.* As I said in an article in the 'Free Press Underground', 'Someone might consider the cartoon on the cover of this issue 'vulgar'. It is not! it is obscene. But it is a social comment concerning a greater obscenity. Chicago cops are obscene; nepalm is the greatest obscenity of the 20th century; and administrators who fear a different view are also obscene.' *The theme of the cartoon is purely political, and the University's act of labelling it 'indecent' can be viewed as political censorship.* (Emphasis supplied).

"The second feature of the issue which the University objected to was an article concerning the acquittal of a young New Yorker after a trial for assault and battery by means of a dangerous weapon. The article was reprinted from a political newspaper, the 'New Left Notes'. The article, which discussed the trial, the composition of the jury and similar matters, was headlined 'Motherf . . . . . Acquitted.' The subject of the article is Ben Morea, the leader of a group in New York's Lower East Side called 'Up Against the

[1] The University specifically denies that it "instigated" the arrests of Miss Papish and her fellow workers.

Wall, Motherf . . . . .', also known as 'The Motherf . . . . .s'. This group is an organization purportedly dedicated to the self-defense of the poor people from police and bureaucratic harassment. The headline, 'Motherf . . . . . Acquitted', *was intended to describe Morea's organizational affiliation.* In that context, which should have been understood by our readers, the word 'Mother . . . . .' has absolutely no sexual or indecent connotations." (Emphasis supplied).

On March 26, 1969 Miss Papish was afforded a hearing by the Student Conduct Committee on the charges stated in the March 12 letter. The Committee made the general finding that Miss Papish, in distributing the February 1969 edition of the *Free Press Underground,* violated the general standard of student conduct prescribed by paragraph B of Article V and decreed her dismissal effective that date. It appears from the Committee finding that Miss Papish's then existing disciplinary probation status was a factor in its decision. The decision was appealed first to the Chancellor of the University and then to the Board of Curators and affirmed in each instance. Because her dismissal was made effective as of March 26, Miss Papish was denied credit for a ceramics course which she successfully completed subsequent to that date, but it is to be noted that she also was able to avoid the otherwise damaging consequence of recordation of the grade of "F" with regard to the other course in which she was enrolled that term.[3]

[3] Following the hearing before the Student Conduct Committee, Miss Papish obtained permission from the University Chancellor to attend classes pending review of the charges. For her post-hearing scholastic efforts, Miss Papish, but for her dismissal, would have received the grade of "B" in Ceramics and the grade of "F" in Research Journalism.

In August 1969 Miss Papish brought this action in the United States District Court for the Western District of Missouri against the University Board of Curators and against certain University officials. The complaint sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343 (3), on the ground that Miss Papish's dismissal from the University was invalid under the First and Fourteenth Amendments. The District Court denied relief on the grounds (1) that Miss Papish "does not have a federally protected or other right to attend a state university of a state of which she is not a domiciled resident or citizen"[*] and (2) that "the conduct of plaintiff for which she was dismissed is not within First Amendment protections." *Papish* v. *Board of Curators of the University of Missouri*, 331 F.Supp. 1321, 1326 (1971). In this court, Miss Papish mounts an attack on these findings along three principal lines. *First*, she asserts that her dismissal is improper because it rests solely upon her exercise of freedoms which the first amendment guarantees. *Second*, it is argued that paragraph B of Article V of the by-laws of the University Board of Curators is invalid because it is impermissibly vague and because its language demonstrates a potential for sweeping improper applications posing a substantial likelihood of deterring important First Amendment freedoms. *Third*, the contention is made that Miss Papish's residence is irrelevant to her claim that University officials acted in violation of her constitutional rights. That being so, it is said that the District Court erred in its finding that Miss Papish was precluded from obtaining relief because, due to her Connecticut residency she did not

[*] The District Court made the finding that Miss Papish was a resident of Connecticut at all times material to the events in litigation. In the view we take of the case, we deem it unnecessary to comment further on this fact and its relevance to Miss Papish's constitutional claims.

possess a federally protected right to attend the University of Missouri.[10] For reasons soon to appear, we affirm the judgment of the District Court, but we do so on grounds which depart somewhat from the reasoning followed by the able and experienced District Judge (The Honorable William H. Becker, Chief Judge).[11]

II

In the light of Miss Papish's academic difficulties, a cogent argument could be made to the effect that we must dismiss this case on the ground that it has now become moot.[12] As set forth above, Miss Papish was, effective January 31, 1969, placed on academic probation by reason of her failure to measure up to the superior academic standards required of those in pursuit of a graduate de-

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[10] In addition to the foregoing claims, Miss Papish asserts that the District Court's decision was influenced, partially at least, by the principles and guidelines set forth in the *Memorandum of Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (WD Mo. 1968). An attack is then directed against the validity of the procedures by which these rules were adopted and, as well, against the substance of the rules therein set forth. We do not find record support for this contention. Accordingly, we express no view on this aspect of Miss Papish's appellate argument.

[11] "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937). See *Brown* v. *Allen*, 344 U.S. 443, 459 (1953); *J. E. Riley Investment Co.* v. *Commissioner of Internal Revenue*, 311 U.S. 55, 59 (1940), and *United States Gypsum Co.* v. *Greif Brothers Cooperage Corporation*, 389 F.2d 252, 262 (CA8 1968).

[12] The general doctrine of mootness remains as a significant judicial tool in dealing with cases in which subsequent events remove the need for adjudication. See, for example, *Cole* v. *Richardson*, 397 U.S. 238 (1970), and *Cole* v. *Richardson*, 40 U.S.L.W. 4381, 4382 (U.S. April 18, 1972). See also, *Securities and Exchange Commission* v. *Medical Committee for Human Rights*, 40 U.S.L.W. 4117, 4118 (U.S. January 10, 1972) and *Roudebush* v. *Hartke*, 40 U.S.L.W. 4171, 4173 (U.S. February 23, 1972).

gree. Her future as a student in good standing was made to depend on improved academic performance and upon successful work towards the completion of her thesis. So far as we are able to determine from the record, neither condition has been fulfilled.[13] Furthermore, the Chancellor of the University has stated by affidavit that Miss Papish is no longer eligible academically to continue as a student in graduate school or to remain as a candidate for a Master's degree in Journalism.[14] Thus, even if we were persuaded that Miss Papish should prevail on the merits of her constitutional claims, it appears that she would not be re-admitted to the University for reasons which are quite distinct from the considerations which led to her dismissal. This being so, we must determine whether Miss Papish's failure to meet the terms and conditions of her academic probation has mooted the case.[15]

There is one factor in this case which weighs against a finding of mootness. We are told by the University that the events in issue attracted immediate public attention and publicity. Although we suspect that Miss Papish did little to keep this affair a private one, the fact remains that the incident received comment in the local press and that the University received hundreds of letters and telephone calls supportive of its stand. Because of the stigma which arose from this publicity and attached to her reputation, we believe that there is at least a colorable basis

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[13] The record contains an affidavit submitted by a professor of journalism at the University. The affidavit recites that Miss Papish was enrolled in, *inter alia*, a one-hour course in Research Journalism during the semester of her dismissal and that had she not been finally dismissed by the University effective March 26, 1969, she would have received the grade of "F" in that course. Appendix, at p. 43.

[14] Appendix, at p. 52.

[15] The "answer [to such a] question is crucial for it is well settled that federal courts may act only in the context of a justiciable case or controversy." *Benton* v. *Maryland*, 395 U.S. 784, 788 (1969).

for finding that Miss Papish retains a significant stake in the outcome of this litigation. The same, we think, may be said for the University. Its legitimate interest in maintaining reasonable regulatory measures for the benefit of all students has been jeopardized and weakened by this lawsuit. It too deserves a definitive answer. For these reasons, we have concluded that the case is not moot.

III

We reject the contentions that the rule of conduct pursuant to which Miss Papish's dismissal was accomplished is unconstitutional on its face.

Miss Papish first points to the discretion of University officials to discipline students whose conduct or speech they deem indecent. This part of the rule, she asserts, provides the University administrators authority to inhibit protected expression which the student fears "might" fall within its proscription. In effect, it is argued that because the rule fails to provide adequate notice as to what conduct or speech is permissible and what is not, and because it encourages arbitrary and erratic disciplinary action, it is unconstitutionally vague and must be excised. We are told that such unbridled discretion "is nothing less than an invitation to invidious censorship and cannot stand under the First and Fourteenth Amendments." This type of argument is not novel. It is not unlike that advanced in *Esteban* v. *Central Missouri State College,* n.1, *supra.* We believe that this court's decision in that case controls disposition of these contentions here. There it was said that

> "[There is] little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity, in college regulations relating to conduct. Certainly these regulations are not to be compared with the criminal statute. They are codes

of general conduct which those qualified and experienced in the field have characterized not as punishment but as part of the educational process itself and as preferably to be expressed in general rather than in specific terms." *Id.*, at 1088.

The rule of conduct attacked here is not ambiguous. It does, to be sure, invest University officials with some flexibility and discretion. But it does not, as Miss Papish would have us believe, invite invidious censorship. The standard contained in the rule restricts University administrators to disciplining expressive conduct in those situations where such a course is necessary to preserve and enhance the University's function and mission as an educational institution. Certainly the language of the rule, together with the governing standard embodied therein, can be easily understood by anyone who possesses the intelligence to gain admission to an accredited institution of higher learning. In our view, the Constitution requires no more.

It is said that even if the rule is not unconstitutionally vague, it is overly broad since, essentially, it is susceptible of application to speech or conduct that is protected by the First and Fourteenth Amendments. We disagree. Since *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), it has been recognized that

> "[a]llowing the broadest scope to the language and purposes of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances; [that] there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem; [that] these include the lewd and obscene, the profane, the libelous, and the insulting

> or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace; [and that] it has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at pp. 571-572. (Footnotes omitted).[16]

Viewed from the *Chaplinsky* perspective, the challenged provision of the rule at issue does not permit arbitrary or sweeping infringement of constitutionally protected interests in a degree not necessary to preserve an appropriate educational environment. It does not confer upon University administrators virtually unbridled and absolute power to suppress with impunity conduct or speech which they deem distasteful. Rather, the rule serves the narrow purpose of authorizing punishment only of those who engage in conduct or speech that detracts from the effectiveness of the educational process—conduct or speech that frustrates University pursuit of its function and mission as an institution of higher learning. It is this objective and definite standard by which the rule is to be applied that, for us, saves its validity in the face of an overbreadth attack. What the express language of the rule fails to articulate is necessarily capable of being supplied by the student tempted to call its validity into question. Compliance requires common sense and minimal respect for the lawful rights of others, not legal acumen.

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[16] See *Gooding, Warden* v. *Wilson*, 40 U.S.L.W. 4329, 4330-4332 (U.S. March 23, 1972). *Gooding*, while recognizing the continuing vitality of the Chaplinsky doctrine, holds that when an overbreadth attack is levied aganist a *criminal* statute, courts will exercise a stricter scrutiny. See also *Cohen* v. *California*, 403 U.S. 15, 18-22 (1971) and *United States* v. *O'Brien*, 391 U.S. 367, 376, 382 (1968).

On this record it sufficiently appears that the rule furthers the legitimate University interest in providing the order and discipline essential to fostering an effective learning process and that its restriction on constitutional freedoms is no greater than is essential to the furtherance of that interest.

IV

We are not persuaded by Miss Papish's contention that even if the rule of conduct under which she was disciplined is not void on its face, it has been unconstitutionally applied in this instance.

As noted above, the parties concede that it was the attempted sale[17] of the *Free Press Underground* that produced the disciplinary action to which Miss Papish now excepts. She argues that the newspaper sold and distributed by her does not lose its First Amendment protection simply because it contained indecent speech, and, in any event, she denies the newspaper contains material which can be labeled "legally obscene." She asserts that such publications as the one she attempted to sell at the crossroads of the campus "create an educationally stimulating atmosphere, promote critical thought, and encourage debate." Finally, she informs us that the University bookstores permit the sale of nationally popular publications which contain erotic and vulgar passages. This latter point, we assume, is to suggest that the apparent inconsistency of dismissing her for sale of the *Free Press Underground* and inviting the reading of other allegedly

[17] The record does not clearly reveal whether the newspaper was being "sold" or whether Miss Papish was distributing it free of charge. We note, however, that the newspaper cover recites a sales price of $.15, and that the Dean of Students testified to his purchase of several copies.

similar literature is so unfair and unreasonable as to constitute constitutionally cognizable harm.[18]

Miss Papish's arguments with regard to unconstitutional application readily reduce themselves to a contention that she had a right to express a controversial and unpopular point of view, free from University regulation and interference. With that contention we partially agree.

But there is no evidence in this record to indicate that the University so applied its rule of conduct as to penalize Miss Papish for advocacy of her ideas. Nor does the record evidence reveal that she unsuccessfully sought permission to sell her publication in the University bookstores.[19] What the record does reflect is an application of the rule to discipline Miss Papish for the manner in which she sought to exercise her rights. Given the absence of record evidence to indicate that the University sought, in any manner, to restrict the substantive message the *Free Press Underground* conveyed, we do not believe that Miss Papish has sustained First Amendment harm. The University could and did rightfully regulate the means by which she sought to espouse her views, but it did so without effectively repressing her ability to advocate the causes

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[18] Compare, as to this aspect of Miss Papish's argument, *Keefe* v. *Geanakos*, 418 F.2d 359, 362 (CA 1 1969), and *Vought* v. *Van Buren Public Schools*, 306 F. Supp. 1388, 1394-1396 (ED Mich. 1969). We reject the import of such an argument. The mere fact that the University permits the sale of certain material in its bookstore does not, without more, inevitably lead to the conclusion that every University student should be free to distribute such material, as he sees fit, in other areas of the campus. We believe that the University has inherent authority to impose reasonable retrictions as to time, place and manner of sale or distribution.

[19] Indeed, the parties have stipulated that the University had granted permission to the *Free Press Underground* to sell its publication on campus. That being so, there is little basis upon which to conclude that the University would entirely close the door to campus distribution.

to which she professed such profound dedication. We know of no constitutional prohibition precluding that course of University regulatory action.[20]

We express no view as to whether the *Free Press Underground* contained materials which can be adjudged obscene *per se* under contemporary legal standards. Nor do we think that consideration to be particularly relevant to disposition of the narrow issue before us. We are aware that free expression plays a vital role in the democratic process. But no provision of the Constitution requires the imposition of so high a value on freedom of expression that it can never be subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures on a University campus. The Constitution does not compel the University to promote the vernacular of the gutter by allowing such publications as the one in litigation to be publicly sold or distributed on its open campus, and this court will not now propound such a rule. Whether such publications must be made available in its bookstores is an issue not properly before us.

The notion that federal courts should not cavalierly interfere in the internal affairs of this Nation's colleges and universities has found expression in earlier decisions of this court. *McConnell* v. *Anderson*, n.1, *supra*. *McConnell* accordingly held that we will not overturn the action of University administrators in the absence of an affirmative showing that it was premised upon an arbitrary, unreasonable or capricious determination. From what we have said it is clear that the University action in this case cannot fairly be described as arbitrary, unreasonable or capricious. In point of fact, this is one of those cases,

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[20] Cf. *Cohen* v. *California*, *supra*, pp. 18-19 of 403 U.S. See also *Norton* v. *Discipline Committee of East Tennessee University*, n. 1, *supra*; *Hatter* v. *Los Angeles City High School District*, 310 F. Supp. 1309 (CD Calif. 1970), and *Baker* v. *Downey City Board of Education*, 307 F. Supp. 517 (CD Calif. 1969).

not at all unfamiliar in student-school litigation, where disciplinary action resulting from crass and absurd conduct is sought to be made redressable by characterizing the underlying factual events in constitutional terms. We hold that the First Amendment does not invalidate the University's dismissal of Miss Papish, and that Chief Judge Becker was quite correct in finding that the University was entitled to judgment.

Affirmed.

Ross, Circuit Judge (dissenting).

I respectfully dissent. It is clear that Miss Papish was dismissed from the University because of a finding that the cartoon, depicting helmeted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice, and the headline, "Motherfucker Acquitted", were obscene. This objectionable material appeared in the *Free Press Underground,* a publication which had been distributed on campus, with the University's permission, for almost two years. The distribution of this particular edition, by Miss Papish, however, was found to be in violation of the Board of Curator's by-law proscribing "indecent conduct or speech." The dismissal could not have been on the basis of physical disturbance or disruption resulting from the distribution, because it was admitted, by stipulation, that there had been none. Rather, the record amply demonstrates that Miss Papish was disciplined for the content of the newspaper, rather than merely its distribution.

The trial court found that the cartoon and the headline were obscene, were "pandered" by Miss Papish, and were therefore not protected by the first and fourteenth amendments. In this Court, the Board of Curators argue that the cartoon, appearing on the cover of the newspaper, and the headline, appearing on the second page, taken together, supply the erotic connotations necessary to be

considered legally obscene under the *Roth* standard. *See Roth* v. *United States,* 354 U.S. 476, 489 (1957). It is clear to me that the cartoon and the headline, alone or together, cannot be characterized as legally obscene.

The cartoon, a hard-biting social comment, may be revolting to most persons, but it certainly cannot be considered obscene under the standards enunciated by the Supreme Court. As stated in an affidavit submitted by an associate professor of art at the University, "[t]he cartoon in question is a biting satirical depiction of the artist's view of police brutality and injustice. The obvious theme is a political protest against police injustice and police interference with liberty."

Likewise, the word "motherfucker", common in the modern radical genre,[1] and used as it was in the news story in question, does not conjure up erotic thoughts of incestuous conduct. *Cf. Cohen* v. *California,* 403 U.S. 15, 20 (1971). In *Cohen,* the Supreme Court held that the words "Fuck the Draft" written upon a jacket, and publicly displayed in a state courthouse in front of women and children, was a protected exercise of the "freedom of speech" guaranteed by the Constitution. The Court held that not only was that expression not legally obscene, but also that the State of California had no overriding justifiable interest in regulating it as "offensive conduct." Certainly a word, such as was used in the *Free Press Underground,* comes as no great shock to the majority of today's youth; and the University cannot validly be said to have an overriding justifiable interest in protecting college-age students from exposure to it. *Cf. Keefe* v. *Geanakos,* 418 F.2d 359, 361 (1st Cir. 1969).

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[1] *See* Lifton, "The Young and the Old", *Atlantic Monthly* (Sep. 1969), for the etymology of the word. This article was introduced by plaintiff as evidence of the type of literature, containing the same word, that was being sold in the campus book store. The same article was also the subject of the litigation in *Keefe* v. *Geanakos,* 418 F.2d 359 (1st Cir. 1969).

There is no doubt an educational institution has authority to prohibit legally obscene material from its campus, because that material retains no constitutional protection. It likewise has authority to regulate dissemination of forms of speech or conduct that is something less than obscene, if that action is calculated to or has the potential effect of being disruptive to the educational process. In such a case, it is the act of dissemination, and the resulting disruption, rather than solely the content of the material disseminated, which is offensive. For a regulation prohibiting such conduct to be constitutionally valid, the student's interests of free expression must be outweighed by the University's interest in protecting its educational process. *See Scoville* v. *Board of Education,* 425 F.2d 10, 14 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970). Moreover, "the standard of conduct which a college seeks to impose must be one relevant to 'a lawful mission, process or function of the educational institution' . . . ." *Esteban* v. *Central Missouri State College,* 415 F.2d 1077, 1088 (8th Cir. 1969). In the absence of constitutionally valid reasons to regulate speech or conduct, students are entitled to freedom of expression of their views. *Tinker* v. *Des Moines School Dist.,* 393 U.S. 503, 511 (1969).

> "Obviously, one does not lose his first amendment rights by matriculation at a college. Those rights follow one through the classroom door . . . . And what better or more ideal place is there for free discussion and for the exchange of ideas than academic halls?" *Esteban* v. *Central Missouri State College, supra,* 415 F.2d at 1085.

It is argued that the fact Miss Papish was distributing "indecent" material on the sidewalks of the campus distinguishes this case from other methods of distribution or exchange of ideas. However, upon the facts of this case,

this argument disregards the premise that the touchstone is disruption or interference with the legitimate educational processes of the University. There must have been more than "mere fear and apprehension of possible disturbance." *Esteban* v. *Central Missouri State College, supra,* 415 F.2d at 1087; *see Tinker* v. *Des Moines School Dist.,* 393 U.S. at 514. Yet, from the record in this case, it cannot be said that the requisite disruption was imminent.

While I wholeheartedly agree that a school has latitude and discretion in formulating its regulation of general standards of conduct, *Esteban* v. *Central Missouri State College, supra,* 415 F.2d at 1088, in a case where a student's constitutional rights are being infringed, those rules and regulations must be related to the legitimate interests of protecting its educational process. By dismissing Miss Papish for the reasons it gave, without a showing of disruption to that process, the University violated her rights of free expression guaranteed by the first and fourteenth amendments. I would, therefore, reverse the district court, and order Miss Papish reinstated unless she is barred from reinstatement for valid academic reasons.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

Order

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1971

No. 71-1338.

BARBARA SUSAN PAPISH,

Appellant,

—VS.—

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied by an evenly-divided Court.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

August 31, 1972

Judgment Denying Plaintiff Declaratory and Injunctive Relief; Judgment for Defendants

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION

Civil Action No. 1466

BARBARA SUSAN PAPISH,

Plaintiff

—v.—

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, *et al.*,

Defendants

FILED
May 7 - 1971
J. C. TRUMAN, *Clerk*
VIRGIL B. COOK
Deputy Clerk

Plaintiff, formerly a graduate student in journalism in the University of Missouri at Columbia, has brought this suit for declaratory and injunctive relief under Section 2201 of Title 28, United States Code, and Section 1983 Title 42, United States Code, as a result of her dismissal from the University on a charge of participating in the distribution of indecent publications on and near the university campus. Plaintiff seeks a declaration of this Court that Article V of Sections A and B of the By-Laws of the

Board of Curators of the University of Missouri, which relates to "indecent conduct or speech," is invalid on its face and as applied in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiff further requests injunctive relief permanently to restrain defendants "from interfering with plaintiff's right to remain at the University of Missouri-Columbia campus and to complete her education . . . and directing defendants to reinstate her as a graduate student"; permanently to restrain defendants "from interfering with plaintiff's constitutional right to disseminate literature protected by the First Amendment"; and to direct defendants "to take any and all steps necessary to grant plaintiff her full credit for course work successfully completed in the Spring Term of 1969." Plaintiff was enrolled as a non-resident graduate student in journalism when the acts occurred which led to her dismissal.

On September 22, 1969, a plenary evidentiary hearing *de novo* was held in this case on the motion for preliminary injunction in accordance with the uniform practice of this Court in student discipline cases.[1] By agreement, the case

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[1] Apparently there is a misunderstanding by some of the practice and procedure in student discipline cases in this district. This is found in the dissenting opinion in *Esteban* v. *Central Missouri State College* (C.A. 8), 415 F.2d 1077 at pages 1090 to 1096. The dissenting opinion, after agreeing with the four substantial bases of jurisdiction in student disciplinary cases, states:

> "However, I reject the district court's procedural approach of reviewing the sufficiency of the disciplinary proceedings conducted by school officials. The trial court has posited the test to be:
>
> 'A federal district court *in appropriate circumstances* will review a student disciplinary proceeding to determine if the challenged disciplinary action was on grounds *lacking* support by any substantial evidence.'" (Emphasis added.)

In footnote 1 at page 1090 the dissenting opinion further stated:

> "Presumably, this last statement is based upon the district court's 'General Order on Judicial Standards of Procedure and Substance In Review of Student Discipline in Tax Sup-

on the merits was also submitted on this record. Full opportunity for argument and filing of briefs was afforded. On January 5, 1970, before the next semester began, the parties were advised that a decision had been reached to

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ported Higher Education,' 45 F.R.D. 133 (1968). The same standard of review is erroneously compounded in other cases from the same district, see, e.g., *Scoggin* v. *Lincoln University*, 291 F. Supp. 161."

From these statements the dissent erroneously concludes that it is the practice in this district to review state student discipline cases in the manner federal agency actions are reviewed under the federal Administrative Procedure Act. The *Scoggin* case is cited as an example. *This conclusion of the dissent is directly contrary as a matter of fact to the record in every student discipline case in this district, including the two* Esteban *cases, the* Scoggin *case, this case, and all other student discipline cases.* In every such case the parties have been afforded the opportunity to develop a full evidentiary record. For example, in the *Scoggin* case this is made clear in the second paragraph which states:

> "Pursuant to procedures directed and agreed upon at a pretrial conference, the parties prepared and filed a full stipulation of facts. *At the plenary evidentiary hearing,* both parties advised that neither wished to adduce any additional evidence." (Emphasis added.) 291 F. Supp. 161 at page 162.

This Court, in its General Order referred to, intended neither to state, nor did it state, that "review" of student discipline is limited to review as under the Administrative Procedure Act. The word "review" was not used in that sense. This is evident from the description of the nature of the action, as an (a) action at law for damages, triable by a jury; (b) a suit in equity under Section 1983; or (c) a declaratory judgment action under Section 1983 and Section 2201, which may be legal or equitable in nature, depending on the issues therein. 45 F.R.D. 133 at page 143. Charles Alan Wright, one of the foremost authorities on federal procedure, found no limited administrative procedure type of review in his analysis of the General Order of this district. Wright, *The Constitution on the Campus*, 22 Vanderbilt Law Review 1027 (1969). As perceptively stated in a student law review note:

> "If the Court does not mean 'review' in the procedural sense, then Judge Lay's dissent and potential controversy disappears." 4 Georgia Law Review 221, 230.

What the portion of the General Order referred to does mean is that, although the disciplinary procedures of the educational institution are otherwise flawless, if there is no substantial evidence of any misconduct received, a finding of misconduct violates the due process clause. Relying on the apposite case, *Thompson* v.

deny the relief sought and that the time for filing post-judgment motions or to appeal would not begin to run until the formal findings of fact and conclusions of law

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City of Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed.2d 654, Le. 659, the General Order so states. 45 F.R.D. at page 147, including note 13. The portion of the General Order is quoted and relied on in the *Scoggin* case. 291 F. Supp. at page 171. It is difficult to see how this clear language could be misunderstood.

If an educational institution gives notice and grants a hearing but no evidence of misconduct is submitted, a finding of misconduct violates due process standards and the Court should hold the finding of misconduct impermissible under constitutional due process standards, whether other evidence is offered in Court or not. This is only one constitutional test mentioned in the General Order of this Court. If the educational institution may offer evidence of misconduct for the first time in the action challenging the student discipline, there is no motive or need to receive evidence of misconduct at the institution's disciplinary hearing. On the other hand, if lawful notice and fair hearing are granted by the institution, ample evidence of misconduct received, reliable findings made and opportunity to be heard granted, should there be a trial *de novo* on the same factual issues in a federal civil rights action? *Barker v. Hardway* (C.A. 4), 399 F.2d 638, cert. denied, 394 U.S. 905, 89 S. Ct. 1009, 22 L. Ed.2d 217, cited in the *Esteban* dissent for the affirmative answer to this question falls short of such an explicit holding. The precise language in the *Barker* case was:

> "We believe the district judge correctly concluded that the administrative appeals which the college afforded the students satisfied the requirements of due process of law. In any event the district judge granted them a plenary *de novo* hearing with counsel. It was upon the evidence received at this hearing that he based his own findings concerning the conduct that led to their suspension. The proceedings in the district court render moot the students' contention that they were denied due process at the college level."

This language falls far short of holding that: "A civil rights action under § 1983 is a separate proceeding which requires a trial de novo on the claim relating to a denial of federal rights." Cf. dissent in *Esteban* case, 415 F.2d at page 1091. The unsolved question is what would have been the ruling in the *Barker* case if a *de novo* hearing on the misconduct issue had not been granted by the district court, and the institutional disciplinary hearing had been lawful and fair and the evidence of misconduct received at that hearing substantial. Only time will answer this question. In the meantime, in this district, all parties are offered a plenary evidentiary hearing in this Court in student discipline cases.

While discussing the General Order of this district Professor Wright comments that the General Order and the process by which

were filed. Because of the pending possible review of the case of *Esteban* v. *Central Missouri State College* (C.A. 8), 415 F.2d 1077,[2] in the Supreme Court of the United States, and of *Soglin* v. *Kauffman* (W.D. Wis.), 295 F. Supp. 978, disapproved in part in the *Esteban* case, *supra*, 415 F.2d at page 1099 (later affirmed in (C.A. 7) 418 F.2d 163) and because of other relevant cases pending in the Supreme Court of the United States,[3] the entry of final judgment in this case was stayed. Later, certiorari was denied in the *Esteban* case at 398 U.S. 965, 90 S. Ct. 2169, 26 L. Ed.2d 548. The *Soglin* case was not reviewed by the Supreme Court of the United States.

Plaintiff was dismissed from the University of Missouri at Columbia for her part in distributing, in and near the Memorial Tower,[4] on February 19, 1969, Volume IV, No. 3,

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it was arrived "smack more of a legislative committee or an administrative agency than they do of a court of law" to those who are old fashioned. Wright, *The Constitution on the Campus*, *supra*, at page 1033. In response it should be said that there are few occurrences which impair the administration of justice more than the contemporaneous and persistent enunciation and application of conflicting rulings of substance and procedure by judges of a multiple judge court with concurrent jurisdiction. To prevent such conflicts by an honest, thoughtful agreement on sound principles after hearing all known interested public and private parties is judicial administration of the highest order. This is the everyday judicial function of a multiple judge appellate court. The function does not become a legislative one when performed by a multiple judge district court. The real test of its desirability and legality is the quality of the product.

[2] Affirming (W.D. Mo.) 290 F. Supp. 622.

[3] See, e.g., *United States* v. *Thirty-Seven Photographs*, 39 U.S. Law Week 3442; *Cohen* v. *California*, 39 U.S. Law Week 3443; *United States* v. *Reidel*, 39 U.S. Law Week 3444.

[4] The Memorial Tower is the central unit of integrated structures dedicated to the memory of those students who died in the Armed Services in World Wars I and II. Other adjacent units include the Student Union and a Non-Sectarian chapel for prayer and meditation. Through the Memorial Arch pass parents of students, guests of the university, students, including many persons under 18 years of age and high school students. Stephens, *History of U. Of Mo.*, 1962, 620-632.

the February 1969 edition of the *Free Press Underground.* Plaintiff's accomplice Markham was distributing the publication on university property. Plaintiff was a 32 year old adult member of the staff of the *Free Press Underground,* a newspaper which had been published since 1965 by the Columbia Free Press Corporation, a non-profit corporation organized under the laws of Missouri, which disseminated news and opinions on university, local and world affairs. The February 1969 edition of *Free Press Underground* contained two features which the university deemed "indecent" within the terms of its by-laws: (1) the front cover duplicating a political cartoon which appeared in the February 1969 edition of *The Movement,* a liberal paper of national circulation and depicting policemen raping the Statue of Liberty and the Goddess of Justice; and (2) an article reprinted from *New Left Notes* concerning the acquittal of a young New Yorker after a trial for assault and battery by means of a dangerous weapon headlined "Mother————Acquitted." The word "Mother————" had no relation to the news story discernible by an ordinary person. The plaintiff knowingly and intentionally participated in distributing the publication to provoke a confrontation with the authorities by pandering the publication with crude, puerile, vulgar obscenities. She admits in her affidavit in support of her motion for preliminary injunction that the cartoon is obscene, stating in part: "It is not [vulgar]; it is obscene." Earlier, on February 12, 1969, the Dean of Students had specifically directed that distribution of the same publication be discontinued because it violated university regulations against indecent literature. Plaintiff had been placed on disciplinary probation for distributing on university day an equally indecent issue of the same publication. She was also on academic probation for failure to submit portions of her thesis. This failure continued until the date of trial. As a result plaintiff is

academically ineligible to continue as a student of the university.

On March 12, 1969, pursuant to Rule 5(c) of the university's rules of procedure in student disciplinary matters, plaintiff received notice of charges against her pending before the Student Conduct Committee, based on the above cited Article V of Sections A and B of the by-laws, of conducting herself "in a manner [not] compatible with the University's functions and missions as an educational institution," in the following particulars:

> "That, while you were on a status of disciplinary probation, you did distribute, or aid and assist in the distribution of the Volume IV, No. 3, February 1969 edition of the *Free Press Underground* containing forms of indecent speech, on the campus of the University of Missouri-Columbia, with knowledge that the Dean of Students had previously declared the forms of speech, thereon appearing, indecent and distribution thereof improper on the University campus under existing rules and regulations."

A hearing was subsequently conducted before the Student Conduct Committee which concluded in the Committee's recommendation that plaintiff be dismissed from the university. The recommendation was adopted and affirmed by the Chancellor and the Board of Curators. In addition to being dismissed, plaintiff was denied credit for a course in ceramics which she successfully completed during the pendency of the intra-university appeals and disciplinary hearings. She was permitted to finish the semester for which she was enrolled.*

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* Plaintiff complains among other things of failure to give her credit for the credit she says she earned in completing this course. She has, however, failed totally to prove that, under University regulations, a dismissed student is entitled to credit for courses completed after the acts resulting in dismissal. It appears, therefore, that this complaint is unfounded.

Student discipline cases of this type are cognizable in the federal district courts if the dismissal, suspension or other penalty imposed upon the student involves the violation of one or more of his or her federally protected rights under color of state law within the meaning of the Federal Civil Rights Act, Section 1983, Title 42, United States Code. See *General Order on Student Discipline in Tax Supported Institutions of Higher Education* (W.D. Mo.), 45 F.R.D. 133, 135. In this case, plaintiff does not raise any question that the procedures of notice and hearing leading to her dismissal failed to comply with minimal standards of due process. Further, it appears that plaintiff received fair notice of the charges and the hearing, an opportunity to be heard in a substantially fair disciplinary hearing; and that the findings of fact upon which the disciplinary action was based were supported by substantial evidence. See *General Order, supra.*

Based on the foregoing facts, it is concluded that judgment must be rendered for defendants in this cause for the separate and independent reasons that (1) plaintiff does not have a federally protected or other right to attend a state university of a state of which she is not a domiciled resident or citizen and (2) the conduct of plaintiff for which she was dismissed is not within First Amendment protections.

Plaintiff was not at any material time a citizen or domiciled resident of Missouri. In basing her claim on Section 1983, Title 42, United States Code, plaintiff asserts that she has been denied a civil right to attend the university of Missouri. It has long been held, however, that one state cannot be held responsible for the education of citizens of another state. In *State of Missouri* ex rel. *Gaines* v. *Canada*, 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208, 213-214, it was said:

"Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities, —each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. The separate responsibility of each state within statehood maintained under our dual system."

It is well settled that the Federal Civil Rights Act was intended to protect from denial under color of state law only those rights granted to citizens of the United States under the Fourteenth Amendment or laws of the United States. *Adickes* v. *S. H. Kress and Company,* 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed.2d 142. The right to attend the University of Missouri, however, is extended by state law, §172.360 RSMo, which provides as follows:

"All youths, resident of the state of Missouri, over the age of sixteen years, shall be admitted to all the privileges and advantages of the various classes of all the departments of the university of the state of Missouri without payment of tuition; provided, that each applicant for admission therein shall possess such scholastic attainments and mental and moral qualifications as shall be prescribed in rules adopted and established by the board of curators; and provided further, that nothing herein enacted shall be construed to prevent the board of curators from collecting reasonable tuition fees in the professional departments, and the necessary fees for maintenance of the labora-

tories in all departments of the university, and establishing such other reasonable fees for library, hospital, incidental expenses or late registration as they may deem necessary."

"Residence" in this and other Missouri statutes means legal residence or domicile. See cases collected in Mo. Ann. §9(e), Restatement of Conflict of Laws (A.L.I. 1937); *State ex rel. Reardon* v. *Mueller*, Mo. App., 388 S.W.2d 53.

The right, therefore, is accorded under the state law, not under the federal constitution or laws. In the absence of exceptional circumstances not present in this case, no violation of plaintiff's federal rights of due process or of equal protection can therefore be predicated on her dismissal from the University of Missouri when she was not a domiciled resident of Missouri. In *Flemming* v. *Adams* (C.A. 10), 377 F.2d 975, 977, it was held that the "right to an education" is not "among those rights guaranteed by the federal constitution." See also *Steier* v. *New York State Education Commissioner* (C.A. 2), 271 F.2d 13, 18, to the effect that "Education is a field of life reserved to the individual states." In *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180, it was held that the requirement that education be provided equally to all persons in the state applies "Where the state has undertaken to provide [the opportunity of education]." 98 L. Ed. at 880. If the rule were otherwise, intolerable burdens to educate citizens of other states could be imposed on any state by citizens of other states. Cf. *Johns* v. *Redeker* (C.A. 8), 406 F.2d 878; *Clarke* v. *Redeker* (D. Iowa), 259 F. Supp. 117.

In opposition to this conclusion, plaintiff contends that §1983:

> "... does not differentiate between citizens on the basis of their residence. It gives 'any citizen' the right to maintain an action against 'every person' who has subjected him to a deprivation of constitutional rights."

As pointed out above, however, because of plaintiff's citizenship and domicil no constitutional or federal statutory right to attend Missouri University was denied to plaintiff by her dismissal from Missouri University. Plaintiff rejoins that a state cannot discriminate against citizens of other states in favor of its own, citing *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 511, 59 S. Ct. 954, 83 L. Ed. 1423; *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 68 S. Ct. 1138, 92 L. Ed. 1478; *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed.2d 600; and *Spanos* v. *Skouras Theatres Corp.* (C.A. 2), 364 F.2d 161. None of those cases, however, relate to education as provided by a state and are distinguishable on that ground, as well as other grounds. No discrimination is shown in the case at bar, when plaintiff might have easily availed herself of her right under the laws of the state of her domicil to attend the state universities or colleges there. This case is unlike that of *Shapiro* v. *Thompson, supra,* in that, in *Shapiro,* the plaintiff was actually a resident of Connecticut but was compelled by a state law to wait until she had been a resident for at least one year to be eligible for state welfare benefits. In contrast, plaintiff in this case is not a domiciled Missouri resident. There is no restriction on the right of plaintiff to travel and resettle when plaintiff has concededly maintained her domicil in a state other than Missouri. Plaintiff further contends that:

". . . [r]ecognizing the immateriality of a student's residence, the federal district courts have upheld suits by nonresidents brought under Section 1983 against state university officials. See, for example, *Wilson* v. *White*, G.C. 6852-2 (unreported)—(N.D. Mississippi); *Zanders* v. *Louisiana Board of Education*, 281 F. Supp. 747."

But there is no indication in *Zanders* that any of the plaintiffs were nonresidents of Louisiana, under the laws of which they claimed the right to attend Grambling College. And if the referenced unpublished decision is in fact contrary to the principles and authorities cited herein and relied on by this Court, then there is no requirement that it be regarded as a controlling or persuasive authority. From the foregoing, it is apparent that plaintiff in this cause can, as a domiciled resident of another state than Missouri, claim no federal right to attend the University of Missouri.

Plaintiff next argues that "having admitted plaintiff as a student, the University must apply the same disciplinary standards to her as it does to resident students." Assuming without holding that that is a sound statement, there is no showing that the same disciplinary standards have not been applied and that discrimination in this regard appears. *Adickes* v. *S. H. Kress and Company, supra.* No denial of equal protection of the laws appears.

The position of plaintiff is not supported by the case of *Dixon* v. *Alabama State Board of Education* (C.A. 5), 294 F.2d 150, in which it was stated that, although "The right to attend a public college or institution is not in and of itself a constitutional right" (294 F.2d at 156), the right to notice and a hearing nevertheless attached once the student had been admitted. Here the notice and hearing

procedures are not challenged under the due process clause. At most by being admitted to Missouri University plaintiff acquired a contractual right for the period of enrollment for attendance subject to compliance with the scholastic and behavioral rules of the university and to dismissal for violation thereof, provided the dismissal was not arbitrary or capricious. *Esteban* v. *Central Missouri State College, supra; Wright* v. *Texas Southern University* (C.A. 5), 392 F.2d 728. Perhaps the university thereby became obligated to refrain from dismissal by procedures which violated concepts of fairplay or minimal due process, but no such violation is shown in the case at bar. It is therefore concluded that plaintiff, because of her nonresidence, has not shown any violation of her federal rights by being dismissed as a student from the University of Missouri under procedures complying with due process standards.

Treating plaintiff's claim for relief as an action based solely on diversity of citizenship, no breach of duty by defendants under state law is proved.

Further, plaintiff's contentions that First Amendment protections apply are without merit. Plaintiff contends that the material distributed by her could in no wise be deemed indecent or "obscene" under judicial decisions respecting the First Amendment right of freedom of speech (though she swears the cartoon was obscene); and therefore that to subject her to discipline for such distribution is to infringe upon her constitutional rights of free speech in the interest of no lawful mission of the university. Further, it is plaintiff's contention that the university by-law on indecent materials, if it includes such materials as distributed by plaintiff, is invalid on its face as applied, or, alternatively, that plaintiff's conduct, as a matter of law, did not constitute a violation of the by-law. Plaintiff notes

in this regard that the distribution of the allegedly "indecent" material was accompanied by no violence or other proscribed conduct; that, in the hearing in this Court, Professor William Wiecek, a historian and lawyer, testified that the word "motherf————" had appeared in leading nationally-distributed magazines, some of which are sold at the university bookstore or maintained in the university library; that Professor Dan Bartlett of the university art department testified that the cartoon had social merit as a social criticism of police brutality, "similar in theme, although not in quality, to works of social criticism done by such artists as Goya, Rembrandt and Daumier"; and that so much of the *General Order, supra,* as states that school authorities may require superior ethical and moral behavior by their students "is inapplicable to activity by students involving the exercise of First Amendment rights." Without deciding whether this testimony was an expression of genuine artistic opinion (which is doubtful) the evidence of the pandering aspect must be considered. First, it should be noted that the words "indecent" and "obscene" are frequently used to express the same meaning. 50 Am. Jur.2d, *Lewdness, Indecency and Obscenity* §2, pp. 451-452; 20A *Words and Phrases,* pp. 520-524. In this case there was evidence of offensive aggressive actions to press this offensive, indecent, vulgar publication on a captive audience, including persons under 18 years of age, in a hallowed place.

The particular interest of the state government in such instances to protect its young citizens from indecent and obscene materials was recognized in *Ginsberg** v. *New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195. And the

* To be distinguished from *Ginzburg,* also cited on this page.

impropriety of federal intervention in matters of state interest involving obscenity has recently been emphasized in *Younger* v. *Harris*, —— U.S. ——, —— S.Ct. ——, 27 L.Ed.2d 669, and *Byrne* v. *Karalexis*, —— U.S. ——, —— S.Ct. ——, 27 L.Ed.2d 792, in instances in which irreparable injury to federal rights is not threatened. The *Ginsberg* case, *supra*, further recognized that a wider definition of obscenity existed for the young than for the adult portion of the community. In *Ginsberg*, obscenity "harmful to minors" was held to be properly proscribable. That permissible proscription is more than met by the materials which were distributed by plaintiff. Further, it is readily apparent that the "pandering" concept recently enunciated in United States Supreme Court cases is applicable in the case at bar. In *Ginsburg* v. *United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, it was held that, even assuming that the publications in question were not strictly obscene, the obscenity test was satisfied by the pandering manner of exploiting erotic appeal for commercial purposes. See also *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736; Note, *Pandering, First Amendment Rights and the Right of Privacy*, 22 Baylor Law Review 442, at 447, where it is noted:

> "The Court distinguished in *Stanley* v. *Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), between private possession of concededly obscene material, which is constitutionally protected, and possession for the purpose of sale or exhibit, which is not protected. This situation is different from *Rowan*—one deals with protected private possession and the other with protected private rejection—but both are based upon the right of privacy . . ."

Plaintiff argues that the university which suspended her:

> "... has no power to regulate or limit the distribution of written material of any kind whatsoever by its students on the public streets and thoroughfares, unless such distribution actually materially and substantially interferes with the requirements of appropriate discipline in the operation of the school";

and that, accordingly, Article V of Section B of the by-laws, if it includes plaintiff's conduct, is invalid on its face as applied because the material distributed by plaintiff is not "obscene" within the meaning of the applicable test announced in *Roth* v. *United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. The maintenance of a decent atmosphere in the area of Memorial Tower and the adjacent Student Union and chapel, and the protection of persons there from pandering indecent publications is a lawful mission of the university. Further, it is apparently plaintiff's conclusory contention that the distributed material is not "obscene" because, in accordance with the opinion of her witnesses, the material had, in terms of *Roth*, "redeeming social value." As noted above, in considering what is obscene, this Court may take into account what is emphasized in the sale and distribution of the materials by the purveyor of the allegedly obscene materials. In *Ginsburg* v. *United States*, *supra*, 16 L.Ed.2d at 35, the United States Supreme Court held that "the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity." Further, in *Ginsburg*, it was the ruling of the Supreme Court that, even in the case where a book may have social worth in a "controlled, or even neutral, environ-

ment," the work was without the ambit of First Amendment protection when:

> "Petitioners . . . did not sell the book to . . . a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity . . . ."

In *Gable* v. *Jenkins* (N.D. Ga.), 309 F. Supp. 998, affirmed 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed.2d 595, the rule of *Stanley* v. *Georgia, supra,* was held not to invalidate a Georgia statute forbidding the dissemination of "obscene materials" by any person. The same is true in this case, particularly with regard to the news story headlined, "Motherf ——— Acquitted." Assuming, without holding, that the story itself may be of redeeming social importance, that aspect was not made most prominent by the arrangement of the news article; rather, the obscene aspect was emphasized and featured in bold face type. The cartoon of policemen raping the Statue of Liberty and the Goddess of Justice features the crude, vulgar and obscene, obscuring any political or social commentary which might incidentally be made. This is particularly true in the university environment in which a substantial portion of the university population is under the age of 18 years and thus does not constitute the "controlled environment" in which such a cartoon might be considered as predominately a social commentary. The university community, which is mainly comprised of younger and less sophisticated persons than those mature persons who are interested in social comment, would not constitute a "controlled en-

vironment."* The indecent obscenity of the cartoon is recognized by plaintiff herself, who, in an article in the same issue of *Free Press Underground*, stated:

> "Someone might consider the cartoon on the cover of this issue 'vulgar'. It is not; it is obscene. But it is a social comment concerning a greater obscenity. Chicago cops are obscene; napalm is the greatest obscenity of the 20th Century; and administrators who fear a different view are also obscene."

Plaintiff contends that this does not constitute an admission, or any recognition otherwise, of the obscenity of the cartoon because the article:

> "... goes on to say that, in her view, obscenity is found in napalm, police brutality and similar things [and that] obviously she was using the word 'obscene' in a metaphorical sense and was not admitting for legal purposes that the cartoon is legally obscene."

Plaintiff reasserts the obscenity of the cartoon in her affidavit in this case in support of her motion for preliminary injunction. In *United States* v. *A Motion Picture Film* (S.D.N.Y.), 285 F. Supp. 465, 471, reversed on other grounds (C.A. 2), 404 F.2d 196, an admission in the government's brief of the social value of a film was said to be a "formal judicial admission." Be that as it may, the affidavit is graphic evidence that plaintiff understood the cartoon to be "obscene" in the common sense of the word. Further, the "metaphorical" use of the term "obscene" as applied to police activities, napalm, and administrative

*University records show some 1,031 students enrolled for the 1968 Fall Semester under 17 years of age.

shortsightedness would not excuse plaintiff's misconduct if accepted as true. The pandering of distinctly and flagrandy indecent, vulgar, obscene sexual cartoons and words to convey a claimed social and political message is not protected by the First or Fourteenth Amendments under the circumstances of this case. In this respect, this case is different from the recent case of *Keefe* v. *Geanakos* (C.A. 1), 418 F.2d 359, in which it was held that a public high school teacher could not be dismissed for pronouncing aloud and discussing in a literature class the "vulgar term for incestuous son." In *Keefe*, it was found that the word, "although repeated, is not artificially introduced, but is important in the development of the thesis and the conclusions of the author." Such is not the case at bar, where the indecent obscenities are appropriate neither to the place, the subject, nor to the comment thereon. Nor were they introduced in a serious classroom study of literature, without pandering. Quoting *Ginsberg* v. *New York, supra*, the *Keefe* case further held "that what is to be said or read to students is not to be determined by obscenity standards for adult consumption." 418 F.2d at 362.

Finally, plaintiff alternatively contends that the condemnatory phrase—"indecent conduct or speech"—of the by-law under which she was dismissed is "excessively vague and does not provide a meaningful standard for limiting speech"; and that the by-law is overly broad. In support thereof, plaintiff cites *Smith* v. *California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed.2d 205, reh. denied 361 U.S. 950, 80 S. Ct. 399, 4 L. Ed.2d 383, and *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed.2d 225. But the former case requires "scienter" in a criminal prosecution and the latter involved the question of vagueness under a municipal licensing ordinance. This is not a crimi-

nal prosecution. For the purposes of university regulations, "indecent conduct or speech" is a definite enough phrase to pass constitutional tests in its nearly being synonymous with "obscene." The university has a wide latitude and discretion in formulating rules and regulations and general standards of conduct. *Goldberg* v. *Regents of University of California*, 248 Cal. App.2d 867, 57 Cal. Rptr. 463, 478. The *Roth* test has been spoken of by the Supreme Court as requiring the application of a "standard of decency." See *Manual Enterprises* v. *Day*, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed.2d 639, 645. The terms are otherwise defined as being synonymous, or nearly so. See Black's Law Dictionary (4th Ed.), p. 909; cf. §1462, Title 18, United States Code; *United States* v. *Alpers*, 338 U.S. 680, 70 S. Ct. 352, 94 L. Ed. 457. This is particularly true in the light of the established principles that substantive disciplinary standards of colleges "may require superior ethical and moral behavior" and that:

> "The legal doctrine that a prohibitory statute is void if it is overly broad or unconstitutionally vague does not, in the absence of exceptional circumstances, apply to standards of student conduct. The validity of the form of standards of student conduct, relevant to the lawful missions of higher education, ordinarily should be determined by recognized educational standards." *General Order, supra*, at 145, 146.[1]

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[1] In the recent case of *Hasson* v. *Boothby* (D. Mass.), 318 F. Supp. 1183, 1187, it was said:

> "[S]tudents may be severely punished by a school administration under its inherent authority without a prior published rule specifically prohibiting the conduct in question . . . See, e.g., *Esteban* v. *Central Missouri State College*, W.D. Mo.,

This court need not decide the question of overbreadth in this case, however, because the obscene publication distributed by plaintiff was not within the First Amendment protections. *Beauharnais* v. *Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919, reh. denied 343 U.S. 988, 72 S. Ct. 1070, 96 L. Ed. 1375; *Roth* v. *United States, supra;* Anno., Right of Free Speech, 2 L. Ed.2d 1706, 1712-1713; *United States* v. *Apple* (D. Md.), 305 F. Supp. 330, affirmed (C.A. 4) 417 F.2d 1070. The plaintiff was not chilled, but encouraged, in her activities by the alleged overbreadth, nor was she doubtful of whether her actions constituted misconduct. The regulation was as precise as federal statutes and court decisions on obscenity. See § 1462, Title 18, U.S.C.; *United States* v. *Alpers, supra.* Further, the vagueness and overbreadth argument is without merit, first, because plaintiff received a precise oral order from an authorized person, the Dean of Students, a week earlier. Distribution of the same issue was clearly forbidden in this authorized and lawful order; second, because the underlying regulation was not unconstitutionally vague or overbroad under criminal law doctrines. *Roth* v. *United States, supra.* Finally, the arguments have been held inapplicable in *Esteban* v. *Central Missouri State College* (C.A. 8), 415 F.2d 1077.*

1968, 290 F. Supp. 622, aff'd 8 Cir. 1969, 415 F.2d 1077; *Jones* v. *State Bd. of Ed.*, M.D. Tenn., 1968, 279 F. Supp. 190, aff'd 6 Cir. 1969, 407 F.2d 834, cert. granted 1969, 396 U.S. 817, 90 S. Ct. 145, 24 L. Ed.2d 69, but dismissed 1970, 397 U.S. 31, 90 S. Ct. 779, 25 L. Ed.2d 27; *Barker* v. *Hardway*, S.D.W. Va., 1968, 283 F. Supp. 228, aff'd 4 Cir. 1968, 399 F.2d 638, cert. den. 1969, 394 U.S. 905, 89 S. Ct. 1009, 22 L. Ed.2d 217; *Norton* v. *Discipline Committee of East Tennessee State University*, 6 Cir. 1969, 419 F.2d 195, cert. denied 1970, 399 U.S. 906, 90 S. Ct. 2191, 26 L. Ed.2d 562. And the Court of Appeals for the First Circuit has indicated in dictum that it is generally inclined to favor this view. *Richards* v. *Thurston* [(C.A. 1), 424 F.2d 1281]."

* See note 7, *supra.*

In support of her further contentions that she is entitled to protection of her rights under the First Amendment, plaintiff cites *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed.2d 731; *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070; *Burnside* v. *Byars* (C.A. 5), 363 F.2d 744; *Dickey* v. *Alabama Board of Education* (M.D. Ala.), 273 F. Supp. 613; *Hammond* v. *South Carolina State College* (D.S.C.), 272 F. Supp. 947; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed 2d 1311; and *West Virginia* v. *Barnette*, 319 U.S. 624, 87 L. Ed. 1628. But those cases did not involve the problem of indecent publications and pandering to youths under 18 years of age, among others. On that score, plaintiff invokes an unreported case purportedly upholding the non-obscenity of this same cartoon on a poster, *People* v. *Brown*, decided by a Judge of the County Court of Suffolk County, New York. Plaintiff quotes the following from that decision:

> "Although the demonstrated ability of its creator does not indicate any prospect of immortal recognition and memory among his fellow man, on the whole the poster is undeniably a savage political cartoon picturing one man's analysis of some aspect of society.
>
> "Satire has always been one of the most physically lacerating and emotionally irritating weapons of the disenchanted, and the fact that a policeman was goaded by the thrust of the cartoon [into applying for a warrant and order of seizure authorizing a search for obscene material] indicates that the designer's message was obvious as his lack of subtlety."

If such a final decision exists, it is neither persuasive or controlling. That case did not involve the pandering in the distribution of the material which is present in the case at bar. The same distinction applies in respect to *Vought* v. *Van Buren Public Schools* (E.D. Mich.), 38 U.S. Law Week 2034, 306 F. Supp. 1388, and *Luros* v. *United States* (C.A. 8), 389 F.2d 200.

Plaintiff's contention of overbreadth of the regulation is based upon the authority of *Soglin* v. *Kauffman, supra,* in which the concept of overbreadth was applied to state university regulations. That case, however, takes issue with this Court's decision in *Esteban* v. *Central Missouri State College, supra,* wherein judicial notice was taken "that outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education." 290 F. Supp. at 630. See also *Gable* v. *Jenkins, supra.* Furthermore, even if *Soglin* v. *Kauffman, supra,* were followed, no relief would be granted in this case. In that case, the district court concluded that:

> "... injunctive relief with respect to the application of the standard of 'misconduct', without more, should be denied in this action, and that the plaintiffs and the members of their classes should be left to seek judicial review of the validity of this standard retrospectively, case by case, as it has actually been applied." 295 F. Supp. at 996.

Finally, if university authorities must describe in detail the prohibited, obscene, vulgar and intentionally repulsive acts which constitute student misconduct, a provocative game of

imagining and implementing endless series of undescribed obscenities, vulgarities and repulsive acts will begin to the detriment of education and to the discredit of the law. In educational history and administration detailed codes of student conduct have been found undesirable. Brady and Snoxell, *Student Personnel Work in Higher Education* (Houghton Mifflin, Boston 1961), p. 378, and *Student Discipline in Higher Education* 10; Williamson and Foley, *Counselling and Discipline* (McGraw-Hill 1949) 1-49, 79-83, and others cited in *General Order, supra.*

Further, it should be noted that in another field the United States Supreme Court has recently reaffirmed the principle that persons granted special privileges or rights under state law, such as the qualified right to practice law, may be required to possess and exhibit superior moral standards. See *Baird* v. *State Bar of Arizona,* —— U.S. ——, —— S. Ct. ——, 27 L. Ed.2d 639, and *In re Stolar,* —— U.S. ——, —— S. Ct. ——, 27 L. Ed.2d 657, relating to state bar applicants. These principles by analogy apply to students in an institution of higher learning.

All of plaintiff's contentions are therefore without merit in fact or law. It is therefore

ORDERED that rendition of final judgment be no longer stayed.[9] It is further

ADJUDGED AND ORDERED that plaintiff's complaint for declaratory and injunctive relief be, and it is hereby, denied and that judgment be, and it is hereby, entered for defendants and against plaintiff.[10]

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[9] Although some of the relevant cases pending in the Supreme Court remain undecided, plaintiff's counsel has requested that entry of final judgment be no longer stayed. See note 3, *supra.*

[10] The court notes that on May 10, 1971, after the entry of the judgment herein, it received the decisions of the Supreme Court

/s/ WILLIAM H. BECKER
William H. Becker
Chief Judge

Kansas City, Missouri
Date: May 7, 1971.

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of the United States in *United States* v. *Reidel*, —— U.S. ——, —— S. Ct. ——, —— L. Ed.2d ——, 39 U.S. Law Week 4523, and *United States* v. *37 Photographs*, —— U.S. ——, —— S. Ct. ——, —— L. Ed.2d ——, 39 U.S. Law Week 4518. Both cases reaffirmed the vitality of *Roth* v. *United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed.2d 1498, a case relied on by the Court for the decision in this case. Further, the Supreme Court held the rule of *Stanley* v. *Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed.2d 542, inapposite to cases in which public distribution is involved, as in the case at bar. In *United States* v. *37 Photographs, supra*, 39 U.S. Law Week at 4522, the Supreme Court stated:

> "Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in Reidel, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution. As we held in *Roth* v. *United States*, 354 U.S. 476 (1957), and reiterated today in *Reidel, ante*, obscenity is not within the scope of first amendment protection."

Similarly, in *United States* v. *Reidel, supra*, 39 U.S. Law Week at 4524-4525, the Supreme Court refused to limit involvement of the law with obscenity "to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age" and upheld the conviction of defendant of violating §1461, Title 18, U.S.C., stating that:

> *"Roth* has not been overruled. It remains the law in this Court and governs this case . . . Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned."

INDEX

	Page
Questions presented	1
Statement of the case	2
Reasons for not granting the writ	3
Conclusion	7
Appendix	A-1
Letter from United States Court of Appeals requesting affidavit	A-1
Affidavit	A-2

Table of Authorities

Close v. Lederle, 424 F.2d 988, cert. den. 400 U.S. 903 6

Healy v. James, 408 U.S. 169, 92 S.Ct. 2338 .....3, 4, 6

Lewis v. City of New Orleans, 40 U.S.L.W. 3614 5

Rosenfeld v. New Jersey, 40 U.S.L.W. 3612 5

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1970) 3, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-794

BARBARA SUSAN PAPISH,
Petitioner,

v.

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, et al.,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Respondents pray the Court to deny the application for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered June 15, 1972.

QUESTIONS PRESENTED

1. Respondents believe that the only determinative issue in this case is whether the University of Missouri has a right to determine a standard of decency in the public use and display of language and pictures on the campus of the

University, which standard does not limit the advocacy o free expression of ideas.

Respondents do not believe that any question of "lega obscenity" is involved as "legal obscenity" is defined i relation to criminal statutes as in the Roth and othe cases cited by Petitioner.

2. Respondents further do not believe the second ques tion propounded by Petitioner is determinative or eve involved, since the Circuit Court of Appeals disregarde the General Order of the District Court, and found n record support for Petitioner's claim that the Distric Court was influenced by that Order (App. 9a, Footnote 10)

STATEMENT OF THE CASE

The Respondents submit the following additions an corrections to Petitioner's Statement of the Case.

The Petitioner had been a graduate student at the Uni versity since the fall of 1963 (J.A. 27a), was on aca demic probation (J.A. 66a) and was on disciplinary pro bation (J.A. 37a) at all times relevant hereto, and i not eligible to return to the University of Missouri as graduate student [Affidavit filed in Court of Appeals pe request of that Court (Resp. p. A-3)].

The Respondents further submit that the article in th issue of the newspaper distributed by Petitioner whic bore the headline "M_____ Acquitted" containe no reference (J.A. 94a) to the political group referred t in Petitioner's Statement of the Case (App. 4, J.A. 141a)

The place of distribution was in and near the Memoria Tower on the campus, through which pass parents o students, guests of the University, students, including man persons under 18 years of age, and high school student (App. 26a, 5a, J.A. 31a).

REASONS FOR NOT GRANTING THE WRIT

Respondents do not believe this to be a case justifying the granting of a writ of certiorari to the Supreme Court.

1. Aside from other considerations, and even though the Court of Appeals determined that the matter was not moot, the Petitioner in this case will not be eligible to return to the University for scholastic reasons, since she has not fulfilled the requirements of scholastic probation imposed on January 31, 1969 (J.A. 66a, 67a and Resp. p. A-3 *supra*).

2. Respondents believe the only question presented in this case is whether the University of Missouri had a right to terminate the student status of Petitioner for deliberately, and with full knowledge of the facts, distributing copies of an issue of the **Free Press Underground** which had on its cover a cartoon depicting helmeted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice and which contained a headline "M_____ Acquitted" which headline had no observable relationship to the story which followed (J.A. 94a), and with Petitioner knowing at the time of such distribution that the matters displayed in the issue being distributed had been banned for distribution by the University upon a determination that it was in violation of the University's standard of decency in the use and display of language and pictures on the campus.

The decision of the Court of Appeals is not in conflict with the cases of **Healy v. James**, 408 U.S. 169, 92 S.Ct. 2338, and **Tinker v. Des Moines Independent School District**, 393 U.S. 503 (1970). What the Court of Appeals holds is set forth in substance in four sentences from the opinion:

"But there is no evidence in this record to indicate that the University so applied its rule of conduct as to penalize Miss Papish for advocacy of her ideas" (App. 15a).

"What the record does reflect is an application of the rule to discipline Miss Papish for the manner in which she sought to exercise her rights" (App. 15a). "The University could and did rightfully regulate the means by which she sought to espouse her views, but it did so without effectively repressing her ability to advocate the causes to which she professed such profound dedication" (App. 15a, 16a).

"But no provision of the Constitution requires the imposition of so high a value on freedom of expression that it can never be subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures on a university campus" (App. 16a).

This holding is consistent with—not in conflict with—**Healy v. James**, *supra*. In Healy, this Court recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools" (92 S.Ct., l.c. 2345). The Court held, however, that the college in that case had **denied** the associational right, not, as in this case, simply **regulating the means by which such right should be exercised.** The Court recognized this right to regulate in the college by stating, "Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected" (92 S.Ct., l.c. 2352). Neither Respondents nor the Court of Appeals overlooked recognizing that First Amendment rights should apply with equal force on college campuses as in the community

at large but recognized, as approved by this Court, that reasonable regulation could be applied to the exercise thereof.

Tinker, *supra*, likewise recognized the distinction between the right itself and the power to regulate the means by which such right should be exercised when the Court states,

> "First Amendment rights, **applied in light of the special characteristics of the school environment**, are available to teachers and students." (Emphasis added.) (89 S.Ct. 733, l.c. 736)

and

> "There is no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone" (*supra*, l.c. 737).

Rosenfeld v. New Jersey, 40 U.S.L.W. 3612, and **Lewis v. City of New Orleans**, 40 U.S.L.W. 3614, are not in conflict. Both are criminal cases, not school discipline cases, and both recognize the right to regulate time, place, and manner of exercising First Amendment rights, **even in criminal cases.**

The position upheld by the Court of Appeals with regard to Respondents' regulations and the application thereof to Petitioner is reinforced by quoting Mr. Justice Powell, when he stated, in Rosenfeld (40 U.S.L.W. 3613),

> "One of the hallmarks of a civilized society is the level and quality of discourse. We have witnessed in recent years a disquieting deterioration in standards of taste and civility in speech. For the increasing number of persons who derive satisfaction from vocabularies dependent upon filth and obscenities, there

> are abundant opportunities to gratify their debased tastes. But our free society must be flexible enough to tolerate even such a debasement provided it occurs without subjecting unwilling audiences to the type of verbal nuisance committed in this case. The shock and sense of affront, and sometimes the injury to mind and spirit, can be as great from words as from some physical attacks."

The instant case is most akin to **Close v. Lederle**, 424 F.2d 988, 990 (1970), cert. den. 400 U.S. 903, where the court said, "The corridor was a passageway, regularly used by the public, including children . . . Where there was, in effect, a captive audience, defendant had a right to afford protection against 'assault upon individual privacy' . . . short of legal obscenity." The court further quotes Professor C. A. Wright, **The Constitution on the Campus**, 22 Vand.L.Rev. 1027, 1040 (1969), "There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context."

3. Petitioner objects to the "General Order" of the District Court for the Western District of Missouri, even though it was not relied on by the Court of Appeals (App. 9a). Petitioner's objection is based on the ground that the General Order distinguishes between university and college regulations and criminal laws. Respondents do not believe this to be in conflict with any holding of this Court. See concurring opinion of Mr. Justice Rehnquist in **Healy v. James**, 408 U.S. 169, 92 S.Ct. 2338, l.c. 2356.

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

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United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

Robert C. Tucker, Clerk

July 28, 1972

Messrs. Dennis J. Stewart,
Jackson A. Wright and
Marvin E. Wright
Office of General Counsel
University of Missouri
University Hall
Columbia, Missouri 65201

Re: No. 71-1338. Barbara Susan Papish v. The Board of Curators of the University of Missouri et al.

Dear Sirs:

In connection with a pending petition for rehearing en banc filed by appellant in this case I am directed by the Court to require you to obtain an affidavit from the proper official of the University regarding present status of the appellant Barbara Susan Papish vis-a-vis University of Missouri. I would appreciate it very much receiving this affidavit from you on or before August 7, 1972.

Very truly yours,
/s/ Robert C. Tucker
Robert C. Tucker
Clerk

dw
copy
Mr. David N. Ellenhorn
Mr. Irving Achtenberg
Mr. Melvin L. Wulf

United States Court of Appeals
for the Eighth Circuit

No. 71-1338

Barbara Susan Papish,
Plaintiff-Appellant,

vs.

The Board of Curators of the University of Missouri, et al.,
Defendants-Appellees.

AFFIDAVIT

State of Missouri }
County of Boone } ss.

Andrew C. Minor, being duly sworn, states:

1. My name is Andrew C. Minor, Route 1, Columbia, Missouri, and I am Associate Dean of the Graduate School, University of Missouri, Columbia, Missouri.

2. This affidavit is made on behalf of The Curators of the University of Missouri pursuant to the request of this Court contained in the letter from Robert C. Tucker, Clerk, dated July 28, 1972.

3. Affiant is in charge of the records of graduate students enrolled in the Graduate School at the University of Missouri, Columbia, Missouri, and as such is familiar with the rules, regulations and requirements of the University of Missouri—Columbia, for admission and retention as a student in the Graduate School (See Exhibit A), and has examined the records of Barbara Susan Papish, a former student and candidate for the Master's degree in Journalism.

4. Affiant has reexamined the affidavit made by affiant on September 15, 1969, and filed in this cause as Exhibit 15 to Stipulation III in the District Court for the Western District of Missouri, and which appears at page 66a, marked Exhibit 5-A, of the Appendix on file in this Court. The facts stated in said affidavit are still true.

5. Affiant further states that to affiant's knowledge, Barbara Susan Papish has not been a student and has not applied for admission to the Graduate School at the University of Missouri, Columbia, Missouri, since September, 1969.

6. Affiant further states that the record of Barbara Susan Papish shows a Graduate School grade average of 2.55. Under normal circumstances, Barbara Susan Papish is not eligible for re-enrollment in the Graduate School because her average of 2.55 is below the requirement that a student must maintain a cumulative grade point average of 2.75 or better.

7. However, since Barbara Susan Papish, while a student, was placed on scholastic probation on January 31, 1969, and failed to fulfill the terms of such probation, as set forth in affiant's previous affidavit, said Barbara Susan Papish is not eligible for readmission to the Graduate School on scholastic probation on two grounds:

(a) She did not fulfill the requirements of her previous probation, and

(b) Her grade average of 2.55 is below the acceptable average of a 2.75 average to be continued on academic probation, unless readmission for one additional probationary semester were recommended by her graduate department of Journalism.

8. The grade average of Barbara Susan Papish of 2.55 was computed without regard to the courses in which

she enrolled for the winter semester, 1969. However, even taking into consideration a 3-hour course in Ceramics 4, course number 332, in which she would have received a grade of B (3.00 grade) (Appendix 49a and 16a) and a 1-hour course in Research Journalism, course number 490, in which she would have received a grade of F (0.0 grade) (Appendix 49a and 43a) her grade average would have raised only to 2.56.

/s/ Andrew C. Minor
Andrew C. Minor

Subscribed and sworn to before me this 2nd day of August, 1972, at my office in Columbia, Boone County, Missouri.

My commission expires May 30, 1974.

/s/ Sue Hagan
Sue Hagan
Notary Public

Exhibit A

University of Missouri—Columbia
Bulletin 1972
Graduate Catalog

***Scholastic Standing**

The grade point average in the Graduate School is based on the student's entire graduate record in courses numbered 200 and above taken at UMC. To remain in good standing, a graduate student must maintain a cumulative grade point average of 3.0 or better. For graduation, the student must earn A or B grades in at least 75 per cent of the hours completed in courses numbered 200 and above carried for graduate credit.

***Probation**

At the end of any semester, a graduate student whose grade point average is below 2.75 will be placed on probation. If, at the end of the following semester, his cumulative grade point average is 2.75 or better, he will be removed from probation. A student on probation who fails to raise his cumulative grade point average to 2.75 may be allowed a second and final probationary semester on the recommendation of his department or area. A student is subject to dismissal if he fails to raise his cumulative grade point average to 2.75 by the end of a second probationary semester or at any time that his semester or cumulative grade point average falls below 2.0.

FILE COPY

FILED

APR 13 1973

MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1972

No. 72-794

BARBARA SUSAN PAPISH,
Petitioner,
v.
THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, et al.,
Respondents.

RESPONDENTS' PETITION FOR REHEARING and RESPONDENTS' SUGGESTIONS IN SUPPORT THEREOF

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INDEX

Page

Petition for Rehearing 1

Suggestions in Support of Petitioners' Petition for Rehearing 7

I. Issuance of per curiam opinion of reversal on merits was improper where only matter pending before Court was "Petition for Writ of Certiorari to the United States Court of Appeals for the 8th Circuit" 7

II. Newspaper and Distribution thereof was not protected free speech under the First Amendment 10

III. A state university has a valid interest in reasonably regulating the time, place and manner of distribution and forbidding distribution of indecent and obscene literature 17

Certification of Respondents'-Petitioners' Counsel A-1

Table of Cases

Barker v. Hardway, 399 F.2d 638 (4th Cir. ....), cert. denied 394 U.S. 905, 89 S. Ct. 1009 16

Chaplinsky v. New Hampshire, 315 U.S. 568 18

Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969) 17

Ginsberg v. New York, 88 S.Ct. 1274 14

Ginzburg v. U.S., 383 U.S. 463, 86 S. Ct. 942 (1966)..13, 14

Haldeman v. U.S., 340 F.2d 59 (C.A. 10, 1965) 14

Healy v. James, 408 U.S. 169 (1972) 9

Miller v. U.S., 431 F.2d 659 (C.A. 9, 1970) 14
Mishkin v. New York, 86 S.Ct. 958 ..... 13, 14

Papish v. Board of Curators of University of Missouri, 464 F.2d 136 (1972) A-1

Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414 14
Roth v. U.S., 354 U.S. 476, 77 S.Ct. 1304 (1957) .. 13, 14, 18

Stanek v. U.S., 368 F.2d 788 (1st Cir. 1966) 9
State v. Ceci, 255 A.2d 700 Del. 15

Other Authorities

Anno. Obscenity, 5 A.L.R.2d 1158 14

Lewdness, Indecency & Obscenity, 50 Am. Jur., §2, p. 451 18

45 Minn. L. Rev. 5 14

28 U.S.C.A., §2106 8

20A Words and Phrases, p. 520 18

IN THE

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RESPONDENTS' PETITION FOR REHEARING
and
RESPONDENTS' SUGGESTIONS IN SUPPORT THEREOF

PETITION FOR REHEARING

Come now the Petitioners, the Board of Curators of the University of Missouri, et al., Defendants, Respondents, in the above entitled case, and respectfully submit this Petition for Rehearing pursuant to Supreme Court Rule 58 upon the following grounds:

1. The Petitioners submit that the Court did not **lawfully** have before it the above entitled case for the purpose of rendering a decision on the merits; but rather had the sole question of whether to grant or deny the petition for a writ of certiorari filed by Barbara Susan Papish, which petition sought a future review on the merits of the decision of the 8th Circuit Court of Appeals.

2. The Supreme Court of the United States by rendering a summary decision on the merits effectively negated its own rules governing matters to come before it in that those rules do not provide for, nor contemplate, the rendering of a decision on the merits when the only subject matter pending before the Court is a petition for Writ of Certiorari.

3. Petitioners herein were denied due process of law because petitioners were not afforded the opportunity to present written briefs on the merits and the opportunity to present oral argument on the merits of the case.

4. The Supreme Court of the United States rendered a decision on the merits without having before it the record of the case as established in the Federal District Court for the Western District of Missouri and the 8th Circuit Court of Appeals, which record would disclose evidence and facts essential to a decision which effects the future of Higher Education, in the following particulars:

a. the court did not have before it a copy of the newspaper which was being distributed so as to observe first hand the impact of the material therein.

b. the court was not correct in its opinion when it assumed the article in the newspaper concerns a member of an organization known as "Up Against the Wall, M—— F——" because the article does not at any place therein name the organization and a reading of the article re-

veals no logical or rational relationship between the headline "M—— F—— Acquitted" and the content of the article.

F—— Acquitted" would not be allowed as it was in violation of the University code of student conduct; which statement was recorded by local and student newspapers, radio and television media and received widespread publicity; that Barbara Susan Papish intentionally violated this directive and the rules and regulations of the University thereafter on February 19, 1969, by selling and distributing the newspaper which is the subject of this litigation, which newspaper contained front page headlines above the cartoon of "Banned From the M.U. Union" "See related stories" as well as the second page headline "M—— F—— Acquitted."

d. That the above specified previous widespread publicity throughout the University and community and the following utilization of headlines of "Banned From the M.U. Union" had the factual and legal significance of enticing the student body, faculty and visitors of the University to purchase the newspaper, thereby effectively engaging Barbara Susan Papish in "pandering" the newspaper by the manner of distribution.

5. That the matter before the Supreme Court of the United States was not a case concerned solely with free speech, but upon a review of the record would reveal it to encompass the questions of time, place and manner of distribution and the intentional violation of a directive of a University official.

6. That the impact of the summary decision on the future of all public institutions of higher education in the United States and their responsibility and mission to educate young people in preparation of their present and future contribution to a civilized and orderly society sug-

gests that such a broad sweeping proclamation of the law should be issued only after petitioners have had an opportunity to present the case on the entire record and the Court has had the benefit of briefs and oral arguments on the merits.

c. that on the 12th day of February, 1969, the Dean of Students read a formally prepared statement to a large crowd of students in Memorial Student Union, which crowd included Barbara Susan Papish, informing the students that distribution of literature with headlines "M——

7. That a state university has a valid and paramount interest and obligation to society not in inhibiting or restraining free speech and the free interchange of ideas, but, in assuring that the form of language used (on a public campus with many young people and students) in expressing and presenting such ideas is acceptable in the academic community and not abhorrent to the vast majority of the public. This mission of an institution of higher education cannot be carried out without the right to place some limitation on the time, place and manner of expression of its constituents, all as measured by contemporary community standards.

8. That the Petitioners have requested the certification and transmittal of the record to the Clerk of the Supreme Court of the United States and hereby incorporate the certified record as part of this motion by reference.

9. That the Petitioners request the Supreme Court to grant oral argument on this Petition for Rehearing.

Wherefore, the Petitioners respectfully pray the Supreme Court to grant oral argument on this Petition for Rehearing and to thereafter enter its order granting a rehearing in the case of Papish v. The Board of Curators of the University of Missouri, et al., No. 72-794, and that all

parties thereto be directed to file briefs on the merits and that the matter be docketed for oral argument.

Respectfully submitted

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RESPONDENTS' PETITION FOR REHEARING
and
RESPONDENTS' SUGGESTIONS IN SUPPORT THEREOF

SUGGESTIONS IN SUPPORT OF PETITIONERS' PETITION FOR REHEARING

I

Issuance of Per Curiam Opinion of Reversal on Merits Was Improper Where Only Matter Pending Before Court Was "Petition for Writ of Certiorari to the United States Court of Appeals for the 8th Circuit."

The Constitution of the United States of America, Article III, entitled "Judicial Department" in Section 2

thereof, provides that the Supreme Court shall have appellate jurisdiction both as to law and facts on cases such as the case at bar with, however, such exception and under such regulations as shall be prescribed by Congress. Congress, in 28 U.S.C.A., Section 2106, entitled "Determination", has provided that "the Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, ..." It is submitted that the only question which was "lawfully" brought before the Supreme Court was the question of whether the Supreme Court would grant or deny the Petition for a Writ of Certiorari filed in the Supreme Court by Barbara Susan Papish. A Petition for a Writ of Certiorari should not be deemed as the final step necessary for the Supreme Court to render a decision on the merits as is conclusively evidenced by Supreme Court Rule 23 which sets forth the matters to be contained in a Petition for a Writ of Certiorari. The Rule contains no provision for the briefing or submission of legal controversies on the merits to place the Supreme Court in a position to render a final decision upon the merits of the case.

An exhaustive review of the Supreme Court rules does not reveal a provision nor any inference indicating that the Supreme Court will render a per curiam decision on the merits when the only pending matter is a Petition for Writ of Certiorari. The Supreme Court rules in fact do provide under Rule 25 thereof that the action to be taken upon a Petition for a Writ of Certiorari shall be an order either granting or denying such petition. Further evidencing the lack of provision for a summary decision on the merits when the only matter pending is a Petition for Writ of Certiorari is Supreme Court Rule 41 which specifically provides that counsel for the Appellant or Petitioner shall file printed briefs on the merits within 45 days of the order granting the Writ of Certiorari. This

Rule would seem to conclusively establish that the Supreme Court deems it absolutely essential to the orderly administration of fair and impartial justice to have before it printed briefs on the merits and oral argument under Supreme Court Rule 44 prior to its rendering a decision on the merits.

Supreme Court Rule 19 contains provisions relating to the considerations governing the review on certiorari. Of all the provisions contained therein, the only conceivable provision applicable to the case at bar is that of "has decided an important question of federal law which has not been, but should be, settled by this court"; it is further pointed out that one of the grounds stated therein for granting a Petition for Writ of Certiorari is where a lower federal court "has so far departed from the accepted and usual course of judicial proceedings." It would appear that the Supreme Court in issuing its per curiam opinion on the merits in the case at bar has in fact departed from its accepted and usual course of judicial proceedings.

Mr. Justice Rehnquist in dissenting from the per curiam opinion states that one of the holdings of the case of Healy v. James, 408 U.S. 169 (1972), is that the public university there involved had not afforded adequate notice and hearing of the action it proposed to take with respect to the students involved. It is submitted that Petitioners, a public university, should be afforded the same judicial opportunity and due process of law as the federal courts have extended to students, by being afforded an opportunity to present a brief on the merits and to be afforded a hearing by way of oral argument to the Supreme Court.

The case of Stack v. United States, 368 F.2d 788 (1st Cir., 1966), provides that a petition for rehearing is not to be filed simply to re-argue matters already argued but is to correct demonstrable error or oversight either by the

court or by counsel. It is respectfully submitted that the Petitioners herein are not seeking a rehearing but are rather seeking an opportunity for the first time to be heard by the Supreme Court prior to the Supreme Court issuing a decision on the merits.

II

Newspaper and Distribution Thereof Was Not Protected Free Speech Under the First Amendment.

The Supreme Court in issuing its per curiam opinion did so without the benefit of having before it the entire record of the proceedings in the lower federal courts. The Supreme Court apparently felt that the facts of the case were such as to present solely a legal issue of pure free speech, without any question of time, place and manner of distribution or that of deliberately violating a directive of a University official. Footnote 6 of the per curiam opinion provides: "As the Court of Appeals opinion states, '[T]he facts are not in dispute' 464 F2 at 138." The per curiam opinion provides on page 4 thereof "the facts set forth in the opinions below show clearly that petitioner was dismissed because of the disapproved content of the newspaper rather than the time, place or manner of its distribution."

It is submitted that the only facts before the Court were those recited in the opinions of the lower federal courts, since the record of the case was not certified and transmitted to the Supreme Court. Those opinions did not recite all of the facts about which there is no dispute, obviously feeling it unnecessary due to the legal theories which were utilized to reach their final decisions. There are facts, however, which were not contradicted, contained in the record and not the opinions, that are crucial to a legal determination of the case at bar, particularly in view of the basis of the Supreme Court's summary opinion.

It would appear that it would have been advantageous for the Court to have had a copy of the newspaper before it so as to observe first hand the impact of the material contained therein prior to the Court rendering a decision that the contents thereof were constitutionally protected. Since the opinions of the lower federal courts did not reproduce the newspaper and the Supreme Court did not have the record of the case before it, it must be assumed that the Court did not see nor study the publication.

The benefit to be derived from having the newspaper before the Court is evidenced in the first page of the Supreme Court's per curiam opinion when the Court says the article discussed a New York youth who was a member of an organization known as "Up Against the Wall, M—— F——". The article did not name any organization and in fact the contents of the article had no rational, logical or recognizable relationship to the blatant and scurrilous headline "M—— F—— Acquitted." In this respect it is submitted that even if the organizational name had appeared in the article it would not have enlightened Petitioners. Petitioners are, however, unaware of whether the organization was well known on the east coast of the United States since in the State of Missouri the name had certainly not appeared in print in any newspaper. Further, the fact was not before the Court that the front page of the newspaper immediately above the cartoon contained the bold headline of "Banned From the M.U. Union" and in somewhat smaller type "See Related Stories". These headlines are discussed later in consideration of the manner of distribution.

The record of the case contains the testimony of the Dean of Students, which was not contradicted by Barbara Susan Papish or any other witness, that on February 12, 1969 (one week prior to the matter in controversy), the Dean of Students read a formally prepared statement to a large crowd of students, including Barbara Susan Papish,

in Memorial Student Union informing them that distribution of literature with headlines "M—— F—— Acquitted" would not be allowed as it was in violation of the University Code of Student Conduct. It is of utmost importance to the case at bar that the facts also reveal that at the time of giving the formal prepared statement and thereafter, the statement was recorded by local and student newspapers, radio and television media and received widespread publication and publicity.

For several days following the Dean of Students' statement the campus community of the University widely discussed the Dean of Students' actions and several confrontations relating to the statement and the Dean of Students forbidding distribution of the material took place. (All of above facts set forth in direct testimony of Dean of Students Jack Matthews, Stipulation III, Exhibit 3 filed in United States District Court for the Western District of Missouri on September 21, 1969.) These facts conclusively show that the distribution of the specified type of literature was forbidden and that throughout the campus and surrounding community there had been widespread publicity of the Dean of Students' action.

It was then, on the 19th of February, 1969, under these circumstances that Barbara Susan Papish distributed the newspaper on the campus bearing the front page headline of "Banned From the M.U. Union" and "See Related Stories". It is hard to envision a more ideal set of circumstances under which to entice college students, faculty and visitors to purchase a newspaper by using the headline "Banned From the M.U. Union". This headline was a come on for everyone, irrespective of age and maturity, to purchase the newspaper and see and read the materials which had previously received such widespread publicity and indicating the material therein was obscene, indecent, lewd, and of a scurrilous nature since it had been banned by the University. The label of "Banned From the M.U.

Union" carries the same connotation in Columbia, Missouri, as does "Banned in Boston" to the east coast.

It is submitted that these facts, which were not considered by the Supreme Court, show that the **time, place** and **manner** of distribution were most certainly an integral part of the case and the case should not turn on the sole issue of "pure" free speech. The manner of distribution reveals that the publication in controversy, with the cartoon and language contained therein, was not protected speech under the Constitution of the United States, particularly when measured under the doctrine of pandering as established by the Supreme Court. Roth v. U.S., 354 U.S. 476, 77 S. Ct. 1304 (1957), Ginzburg v. U.S., 383 U.S. 463, 86 S. Ct. 942 (1966). The prospective audience for distribution included a student body of which over 25 percent were first time freshmen directly out of high school, some as young as 16 years of age and of the entire student body 72 percent were under age 21. (Direct and cross-examination of Chancellor John W. Schwada and Dean of Students Jack Matthews, Stipulation III and transcript of testimony in Federal District Court, P. ....). As stated in Mishkin v. New York, 86 S. Ct. 958, 964, "We adjust the prurient appeal requirement to social realities by permitting the appeal to be assessed in terms of its intended and probable recipient group".

Under the circumstances of the case at bar and in light of federal obscenity standards set forth in Roth v. United States, supra, and Ginzburg v. United States, supra, it can hardly be questioned that the cartoon, the suggestive front page headline and the scurrilous headline of "M—— F—— Acquitted" taken together, are obscene. The cartoon graphically depicts a rape scene with excessively stark realism, including the bare parts of the bodies of the participants and victims, and seeks to capture the attention of potential readers by its graphic portrayal of the shocking sexual extremes of sadism and masochism. When added

to the explicitness of the second-page headline, the newspaper cannot be viewed otherwise than an attempt to promote a "shameful or morbid interest in . . . sex" in a way which "goes substantially beyond customary limits of candor in description or representation of such matters." Anno., Obscenity, 5 A.L.R. 3d 1158, 1171; Haldeman v. United States (C.A. 10), 340 F.2d 59.

It would appear that, under the governing standard of Roth v. United States, supra, to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest and is utterly without redeeming social value. This is particularly true in the state university community, in which the state has a particular interest in protecting younger citizens from obscenity. Ginsberg v. New York, supra. Circulation of obscene material "indiscriminately", or with reckless disregard whether it will fall into the hands of juveniles has been held to violate the standards of Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, and Ginsberg. See Miller v. United States, supra, 431 F. 2d at 659. Ginsberg condemns "exposure [of minors] to material . . . harmful to minors." 88 S. Ct. at 1281.

Further, under the concept of "variable obscenity" approved in Ginsberg, 88 S.Ct. at 1278, n.4, and employed in Mishkin v. United States, supra, it was proper, in determining whether the distributed materials were obscene, to consider that the entire population to which the newspaper was sought to be distributed was younger than average. See Ginsberg, supra, at 1278, n. 4, quoting Lockhard & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn.L.Rev. 5, 85 to the following effect:

> "Variable obscenity . . . furnishes a useful analytical tool for dealing with the problem of denying adolescents access to material aimed at a primary audience

of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance."

The Supreme Court's attention is directed to a case where the language utilized was quite similar to the case at bar. State v. Ceci, 255 A.2d 700, 701 (Del.) involved distribution of materials almost identical to those distributed by appellant in the case at bar. The facts of that case were that:

"On the morning of April 22, 1968, each of the defendants distributed leaflets on the University of Delaware campus. Handprinted in large letters across the top of each leaflet was the quotation 'Up Against the wall M[other] F[ucker].' The last word occupied a separate line and was underlined. Beneath the quotation were several paragraphs which developed the theme that true obscenity was to be found not in words, but rather in the conduct of the Vietnam war by the United States, and in this country's tolerance of black ghettoes."

The Court considered the manner of distribution and the obvious intention that the words appeal to the prurient interest in finding that the publication was obscene. The Court rules that the defendants:

"Could not, under the guise of free speech, commit lewd, obscene or immoral acts in a public place as a prelud to the showing of a documentary film intended to demonstrate the "true" obscenity of the war in Vietnam. [This example], though more drastic [is] in principle the same sort of attention-getting devise as defendants have employed in their leaflet. The fact that the forbidden language appears on the same sheet of paper as does an essay incorporating and explaining

the use of that obscenity brings defendant's conduct to the very dividing line between the permissible and the impermissible, but such a line exists and must be respected . . . But it is well recognized that States and municipalities have a legitimate interest in protecting their citizens from uninvited shocks of this kind. Even assuming that further reading of the leaflet would soothe the reader's initial outrage by revealing the 'obscenity' of the headline as merely an illusion, nevertheless, citizens confronted without their consent and affronted by an obscene headline cannot be required to read on at the risk of further offense.

"In short, having by size of print, placement and underlining of an obscene word taken it out of context so as to maximize its attention-getting potential, defendants will not now be heard to argue that the word must be afforded the same protection it has when taken in context of the body of the essay." 255 A.2d at 704-705.

These suggestions have pointed out facts in this case showing that there is certainly a question of time, place and manner of distribution. Furthermore there must be pointed out that Barbara Susan Papish knowingly violated a directive of a University official when she distributed the newspaper, knowing that the Dean of Students had announced that the language was contrary to the Code of Student Conduct. Surely, this shows that the case is not one of pure speech, but rather is one where pure speech is utilized as an excuse for actions and conduct in violation of the University regulations. A disguise of constitutional free speech does not excuse the violation of a direct and lawful order of a college officer predicated upon educational interests. Barker v. Hardway, 399 F.2d 638 (4th Cir. ....) cert. denied 394 U.S. 905, 89 S.Ct. 1009. The Court's attention is drawn to the fact that the Code of Student Conduct hereinbefore mentioned is not limited to indecent conduct

or speech, but further provides "failure to comply with requests of University officials in the performance of their duties" as an example of conduct which would contravene the accepted standard. Barbara Susan Papish was both charged by the Dean of Students and found guilty by the hearing committee of distributing the newspaper in question with knowledge that the Dean of Students had previously declared the forms of speech therein appearing indecent and distribution thereof improper on the University campus. It would appear that these facts should be sufficient to enable a University to terminate a student. If not, a University has no means of operating an educational institution with any semblance of order and decorum.

III

A State University Has a Valid Interest in Reasonably Regulating the Time, Place and Manner of Distribution and Forbidding Distribution of Indecent and Obscene Literature.

Petitioners have consistently and vigorously adhered to the recognition of First Amendment rights of students, faculty, employees and visitors of the University of Missouri, but at the same time have sought to fulfill the educational mission of a state university and to meet the obligation which the university has to society and particularly the State of Missouri. A state university must of necessity have rules and regulations to guide it in the accomplishment of its educational mission, otherwise there would exist a condition of chaos. Universities most certainly can have reasonable rules and regulations that pertain to the activity and coduct of students. Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969). The Code of Student Conduct of the University of Missouri, partially set forth in footnote 2 of the per curiam opinion, is just such a rule and regulation. That rule informs students that they are

required to observe generally accepted standards of conduct and that indecent conduct or speech would contravene that standard. It is pointed out that the type of speech or activity stated in the rule does not contravene any constitutional rights because the words "indecent" and "obscene" are frequently used to express the same meaning. Roth v. U.S., supra, 50 Am. Jur. 2d, Lewdness; Indecency and Obscenity § 2, pp. 451-452; 20A Words and Phrases, pp. 520-524. It is submitted however, that even if indecent speech is considered as something less shocking that obscenity, certainly a University has such a vital public interest in the form of speech to be utilized on its campus that it can require "decency" in speech during the free expression of ideas and thought within the academic community. In an academic setting, with many young people present, it appears that the rape scene cartoon and the scurrilous headline "M—— F—— Acquitted" are as expressed in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 as being "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

The Supreme Court prior to handing down its per curiam opinion did not have the benefit of the record of the case and an opportunity to review the testimony of the obligations and functional missions of the University and the necessity of requiring "decent" language. On this vital point, the Chancellor of the University of Missouri—Columbia campus stated in direct testimony as follows:

> "The University has a vital **educational interest** in the forms of speech and press presentations employed by its students on the University campus. A significant function of the University is to further the concept of orderly, rational presentation of arguments pro and con on virtually all issues and it is expected and generally believed that the educational community

possesses exceptional ability to present and discuss issues without resort to the utilization of emotion producing, shocking, or indecent forms of speech. It is important that the University teach its students to discuss the issues utilizing socially accepted forms of speech. I know of no newspaper in general circulation in this state which has or would have printed the word raised in this case (and most especially in the manner it appears in the questioned publication), and the use of that or comparable words is not commonly accepted practice within the broader community. Additionally, the educational philosophy which prevails within the University communities asserts that learning is not limited to the classroom alone, but takes place through the campus. If this proposition supported by students and faculty, is true, then the University has, in my opinion, an appropriate concern with the quality of activities in the University community. The indiscriminate employment of indecent forms of speech in presenting issues for discussion on the University campus can be prohibited in furtherance of this educational philosophy.

The general public expects, and rightfully so in my opinion, that although wide range of discussion of issues is encouraged by the University indecent forms of speech should not be employed in these discussions, and unless the University opposes the use of indecent forms of speech the public assumes that the University in fact supports, sanctions, endorses and protects such forms of speech as part of the learning process within the University. The public reaction in this case was overwhelmingly in favor of the actions taken by the University. Of the something over 100 letters received, only 2 were in any way critical of the University's position, and most were warmly and vig-

orously in support of it. The University has a vital interest in encouraging the general support of the University by citizens.

Additionally, if the University permits the distribution of indecent forms of speech on its campus, students accept that which is being distributed as in keeping with the University's attitude and philosophy toward the learning process.

The University can legitimately expect, in my opinion, a higher standard of thought, expression and discrimination in the use and presentations of ideas than can be expected of the broader society beyond the campus. Those in attendance are expected to be able to express themselves intelligently, and it is a legitimate purpose of the University to teach students how to discuss intelligently any issue utilizing generally accepted forms.

A significant share of the students at the University of Missouri-Columbia have neither the years nor the experience of Barbara Susan Papish and therefore may not have yet gained the understanding and maturity essential to a careful analysis of that which they may read or hear. Seventy-two per cent of the undergraduate students enrolled on the Columbia campus last fall were under the age of 21 years, and over twenty-five per cent were first time freshmen directly out of high schools of this and other states.

In order to preserve and encourage within the University community the inordinately free expression of thoughts and ideas, the University may legitimately insist, in my opinion, as a very minimal restriction that the thoughts and ideas be expressed without the utilization of indecent and generally unacceptable forms of speech." (Stipulation III, R.51a)

Wherefore, Petitioners respectfully request the Court as follows:

(1) to grant oral argument on this motion

(2) to set aside the per curiam opinion entered herein

(3) to request briefs on the merits and to set the matter for oral argument.

Respectfully submitted

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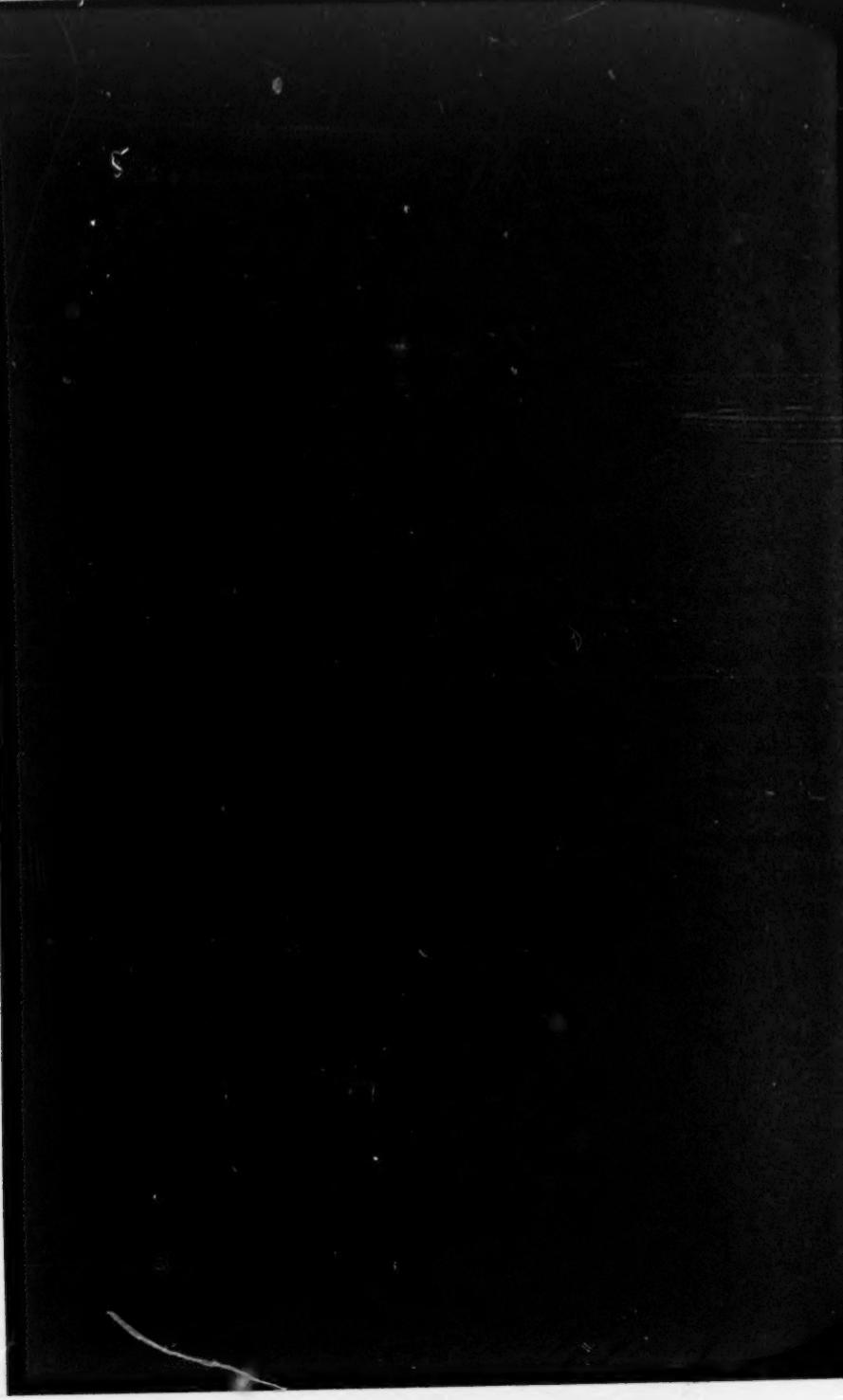

In the Supreme Court of the United States

Barbara Susan Papish
Petitioner

v.

The Board of Curators of the University of Missouri, et al.
Respondents

No. 72-794

Certification of Respondents'-Petitioners' Counsel

Comes now Jackson A. Wright, General Counsel for The Curators of the University of Missouri, as attorney for the Respondents-Petitioners in the above styled case and pursuant to Rule 58 of the Supreme Court rules of the United States and in accordance therewith and in connection with the Petition for Rehearing hereinbefore set forth states that the Petition for Rehearing is presented to the Supreme Court by the Respondents-Petitioners in good faith and further states that said Petition for Rehearing is not submitted for purposes of delay and further that said Respondents-Petitioners deem the matters set forth in the Petition for Rehearing as being of great substance and importance to institutions of higher education, more specifically the Respondents-Petitioners herein.

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Attorney for Respondents-Petitioners

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-794

BARBARA SUSAN PAPISH

Petitioner,

vs.

THE BOARD OF CURATORS OF THE
UNIVERSITY OF MISSOURI, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Motion for Leave to File a Brief Amicus
Curiae on Behalf of Citizens for Decent
Literature, Inc., an Ohio Corporation,
in Support of Respondents' Petition
for Rehearing with Brief Amicus Curiae, Annexed

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SUBJECT INDEX

	Page
Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit . . .	1 -
Motion for Leave to File a Brief Amicus Curiae on behalf of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents' Petition for Rehearing	1 - 12
Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents' Petition for Rehearing	13 -
Statement of the Case	13 -
Academic History of Miss Papish	13 - 14
Disciplinary History of Miss Papish	14 - 29
Reasons for Granting Rehearing and Restoring Case to Docket for Argument	29 - 33
I. Papish Has Failed to State a Cause of Action as to Which a Federal Court Has Original Jurisdiction.	29 - 33
(A) 42 USC Section 1983 Does Not Encompass a Civil Action to Review School Administrative Practices Where the Allegation of Due Process Denial is Unrelated to Racial Discrimination. .	29 - 33
1. The Jurisdictional Question Has Not Yet Been Decided by This Court.	29 - 31
2. The Congressional Purpose in Passing the Civil Rights Act of 1871, (42 USC Sect. 1983) was to Prevent Racial Discrimination. It Was the Intent of Congress at That Time That 42 USC Sect. 1983 Should Not be Interpreted as a General Federal Tort Law Authorizing Federal Lawsuits Against School Administrative Practices.	31 - 33
II. Assuming That a Claim Has Been Stated as to Which the Federal District Court Had Original Jurisdiction, Still This Court Erred in Reversing the Trial Court Judgment Without Examining the Entire Record Upon Which That Judgment Was Based.	33 - 37

SUBJECT INDEX - CONTINUED

III. The Per Curiam Opinion is in Error in Refusing to Look at the Record and in Concluding, From the Limited Facts Which Appear in the Opinions Below, That "The State University Action Cannot be Justified as a Non-Discriminatory Application of Reasonable Rules Governing Conduct." . . . . . .

A. The Record Presents an Obscenity Case Involving Unlawful Student Conduct, and All Three Agencies: The University, The District Court and the Court of Appeals Treated it as Such in Their Rulings on the Matter . .

1. The Obscenity Issue: Underground Newspapers . . . . . .

2. The District Court Solution . . . .

3. The Court of Appeals Solution . . .

B. The University of Missouri Obscenity Rule is Constitutional on its Face . .

(1) The Word "Indecent" as Used in the Rule and Applied in this Case, Provides a Reasonably Ascertainable Standard of Guilt. .

(2) As Interpreted Herein, the Missouri Obscenity Rule Satisfies the Constitutional Requirements re Mens Rea and Burden of Proof. . . . . .

C. The Record Which This Court Failed to Examine Reflects That the University of Missouri Obscenity Rule Was Applied In a Constitutional Manner to Miss Papish's Conduct on the Open Missouri Campus. . . . . .

D. This Court Should Adopt the Rule of Law Laid Down by the English Courts in R. v. Anderson et al. That "Where One Has an Article Such as This Com-

COPY BOUND CLOSE IN CENTER

SUBJECT INDEX - CONTINUED

	Page
III-D Contd. prising a Number of Distinct Items, the Proper View of Obscenity . . . is to Apply the Test to the Individual Items in Question. It is Equally Clear That if, When so Applied the Test Shows One Item to be Obscene That is Enough to Make the Whole Article Obscene ."	48 - 52
IV. To Rule on the Merits of the Case Without Examining the Entire Record in the Court Below Would be a Denial of Due Process of Law	52 - 53
Conclusion	53

TABLE OF AUTHORITIES CITED

CASES

Brown v. Oklahoma, 492 P.2d 1106 (Dec. 16, 1971)	4, 5
Cason v. City of Columbus, __ U.S. ___, 34 L.Ed.2d 507, __ S.Ct. __ (Dec. 11, 1972)	4, 5
Cohen v. California, 403 U.S. 15, 29 L.Ed.2d 284, 92 S. Ct. 26 (June 7, 1971); reversing People v. Cohen, 1 Cal. App.3d 94, 81 Cal. Rptr. 503; Hrg. denied by Calif. Sup. Ct. on Dec. 17, 1969	2,3,4,5
Esteban v. Central Missouri State College, 415 F.2d 1077, 1090, et seq. (8th Cir. Aug. 28,1967)	31
Farrell v. Joel, Jr. 437 F.2d 160, 162 (2d Cir. Jan. 20, 1971).	30
Flying Eagle Publications, Inc. v. U. S., 285 F.2d 307, 308 (Jan. 10, 1961).	52
Ginzburg v. U.S., 383 U.S. 463, 16 L.Ed.2d 3, 86 S.Ct. 942 (Mar. 21, 1966)	40-41
Gooding v. Wilson, 405 U.S. 229, 31 L.Ed.2d 408, 92 S.Ct.__ (Mar. 23, 1972), reversing on a writ of habeas corpus, Wilson v. Georgia, 223 Ga. 531, 150 S.E.2d 446 ( )	2, 4, 5

TABLE OF AUTHORITIES CITED - CONTINUED

CASES - CONTINUED

	Page
Griffin v. Breckenridge, 403 U.S. 88, 29 L.Ed.2d 338, 91 S.Ct. 1790 (June 7, 1971)	31-32
Heller v. New York, No. 71-1043, p. 7, fn. 7-16 . . .	8-9
Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793, 84 S. Ct. 1676 (June 22, 1964) . . .	7-8, 10
Kois, Joseph R. v. Breier, 312 F.Supp. 19, pp. 24,25 (May 6, 1970).	38
Kois v. Wisconsin, 408 U.S. 229, 33 L.Ed.2d 312, 92 S.Ct. __ (June 26, 1972), reversing Wisconsin v. Kois, 188 N.W.2d 467 (June 29, 1971)	2-3, 5, 38-39, 5
Lewis v. City of New Orleans, 408 U.S. 913, 33 L.Ed.2d 320, 92 S.Ct. 2499 (June 26, 1972), vacating judgment of Sup. Ct. of Louisiana in New Orleans v. Lewis, 257 La. 993, 244 So.2d 860 ( )	3-4, 5
Milky Way Feed Co., Inc. v. Leary, Aff'd on Merits in 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 812 (Feb. 27, 1970)	50
Mohney v. Indiana, No. 71-1347, Petn. for Cert. filed Apr. 19, 1972.	50
Papish v. The Bd. of Curators of Univ. of Missouri, et al., 331 F. Supp. 1321, 1326, 1329 (1971)	28, 31,
Papish v. Bd. of Curators of Univ. of Missouri, 464 F.2d 136, 144 (June 15, 1972)	28, 44
Redrup v. New York, 386 U.S. 767, 18 L.Ed.2d 515, 87 S.Ct. 1414 (May 8, 1967)	8, 47
R. v. Anderson et al., 3 All. E.R. 1152 (Nov. 3, 4, 5, 1972)	7, 11, 41, 50,
Rosenfeld v. New Jersey, 408 U.S. 901, 33 L.Ed.2d 320, 92 S.Ct. 2479 (June 26, 1972)	3, 5
Roth-Alberts, 354 U.S. 476, 491, 492, 1 L.Ed.2d 1498, 1510, 1511, 77 S.Ct. 1304 (June 24, 1957)	45-46,
Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed. 2d 205 ( ).	47
U.S. v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524, 529 (Feb. 29, 1960).	43

COPY BOUND CLOSE IN CENTER

TABLE OF AUTHORITIES CITED - CONTINUED

	Page
CODES AND RULES	
28 USC, Section 1254(1)	29
Section 1343(3)	20
42 USC, Section 1983 (Civil Rights Act of 1871)	29, 30, 31
Section 1985 (Civil Rights Act of 1871)	31, 32-33
U.S. Supreme Court Rule 21(1)	6, 52
Rule 21(2)	6, 52
Rule 25	7, 53
MISCELLANEOUS	
By-Laws of the Borad of Curators of the University of Missouri, Article V, Sect. A and B.	17, 19, 28
Murphy and Pritchett Text, "Courts, Judges and Politics," pp. 547-562	50
Supreme Court Practice, by Stern and Gressman, Fourth Edition, p. 269, et seq.	6-7, 52-53
Appendix A (Count 3, Anderson Opinion)	7, 39, 41
Appendix, page 9a	20
Appendix, page 11a	20
Appendix, page 16a	14
Appendix, pages 22-24a	25-27, 34
Appendix, page 39a	14
Appendix, pages 39a-41a.	15
Appendix, page 42a	14-15, 16
Appendix, pages 48a, 49a.	14
Appendix, pages 53a-55a	22-25
Appendix, page 56a	16
Appendix, page 59a	16

MISCELLANEOUS - CONTINUED

	Page
Appendix, page 60a	16
Appendix, page 61a	16-17
Appendix, page 62a	18, 34
Appendix, page 63a	18-19
Appendix, page 64a, Para. B	19, 20
Appendix, page 65a	21
Appendix, page 66a	14
Appendix, page 94a	34-35
Appendix, page 146a	35

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IN THE

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BARBARA SUSAN PAPISH,

Petitioner,

vs.

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Motion for Leave to File a Brief Amicus Curiae on Behalf of Citizens for Decent Literature, Inc. an Ohio Corporation, in Support of Respondents' Petition for Rehearing.

Citizens for Decent Literature, Inc., an Ohio Corporation, respectfully moves for leave to file a brief as amicus curiae in support of Respondents' Petition for Rehearing herein. The consent of the Board of Curators of the University of Missouri has been obtained, and has been filed with this Court. The consent of Irving Achtenberg, one of the attorneys for Peti-

tioner, was requested by air mail letter dated April 5, 1973.

Citizens for Decent Literature, Inc., an Ohio corporation, (hereinafter referred to by the short title "CDL") was formed for and is dedicated to the cause of decent and wholesome literature, with a view to oppose and eliminate obscene literature by cooperating with law enforcement in the enforcement of this Nation's obscenity laws. CDL believes that this Court's obscenity decisions during the past 15 years have, without reason, failed to give proper recognition to the fundamental spiritual principles and moral values upon which this Nation's obscenity laws are structured. See, for example, this Court's rulings during the past two terms of Court in *Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284, 92 S.Ct.26 (June 7, 1971)[1] reversing *People v. Cohen*, 1 Cal. App.3d 94, 81 Cal Rptr. 503, hearing denied by the California Supreme Court on Dec. 17, 1969; *Gooding v. Wilson*, 405 U.S. 229, 31 L.Ed.2d 408, 92 S.Ct.____ (Mar. 23, 1972),[2] reversing, on a writ of habeas corpus, *Wilson v. Georgia*, 223 Ga.531, 156 S.E.2d 446 ( ); *Kois v. Wisconsin*, 408 U.S. 229, 33

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[1] *Cohen* was convicted of a breach of the peace charge alleging "offensive conduct" for wearing a jacket bearing the plainly visible words "Fuck the Draft" while in the corridor of a County courthouse. This Court overruled the California Supreme Court's judgment which had rejected Cohen's contention that his conviction violated his federal constitutional right to free speech.

[2] The Georgia charge alleged that Wilson did "use to or of another and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace," where, in remarks to a police officer, who was attempting to restore access to a public building, Wilson said to one officer, "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death" and to another accompanying officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you to pieces. . . ." This Court overruled the Georgia Supreme Court judgment which had rejected Wilson's claim that the Georgia breach of the peace statute had been applied to constitutionally protected speech.

L.Ed.2d 312, 92 S.Ct. _____(June 26, 1972),[3] reversing *Wisconsin v. Kois*, 188 N.W.2d 467 (June 29, 1971); *Rosenfeld v. New Jersey*, 408 U.S. 901, 33 L.Ed.2d 320, 92 S.Ct. 2479 (June 26, 1972),[4] vacating the judgment of the Superior Court of New Jersey and remanding the case for reconsideration in the light of *Cohen v. Calif., supra; Lewis v. City of New Orleans*, 408 U.S. 913, 33 L.Ed.2d 320, 92 S.Ct. 2499

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[3] *John R. Kois*, publisher of the underground newspaper, "Kaleidoscope" had been convicted for publishing obscene material, to wit, two pictures portraying the act of intercourse in a sitting position on a bed (page 17 of the May 10-23, 1960 issue); and a poem entitled "Sex Poem", describing in detail the physical and emotional impact during intercourse from the standpoint of the participating male (pages 16 and 17 of the August 9-22, 1968 issue). This Court overruled the Wisconsin Supreme Court judgment which had held both the photographs and the poem not to be constitutionally protected.

[4] *Rosenfeld* addressed a public school board meeting attended by about 150 people, approximately 40 of whom were children and 25 of whom were women. In the course of his remarks he used the adjective "Mother Fucker" on four occasions, to describe the teachers, the school board, the town and his own country. This Court overruled the New Jersey Supreme Court judgment which had denied certification of the Appellate Division's decision affirming Rosenfeld's conviction under a New Jersey statute, which provides:

> " 'Any person who utters loud and offensive or profane or indecent language in any public street or other public place, to which the public is invited . . . is a disorderly person' "

NJ Rev State § 2A: 170-29(1) (1970).

Prior to appellant's prosecution, the Supreme Court of New Jersey had limited the statute's coverage as follows

> ". . . the words must be spoken loudly, in a public place and must be of such a nature as to be likely to incite the hearer to an immediate breach of the peace or to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer. The words must be spoken with the intent to have the above effect or with a reckless disregard of the probability of the above consequences." State v. Profaci, 56 N.J. 346, 353, 266 A.2d 579, 583-584 (1970).

(June 26, 1972),[5] vacating the judgment of the Supreme Court of Louisiana in New Orleans v. Lewis, 257 La. 993, 244 So.2d 860 ( ), and remanding the case for reconsideration in light of *Gooding v. Wilson, supra; Brown v. Oklahoma*, 408 U.S. 914, 33 L.Ed.2d 326, 92 S.Ct._____ (June 26, 1972)[6] vacating the judgment of the Court of Criminal Appeals of Oklahoma in *Brown v. Oklahoma*, 492 P.2d 1106 (Dec. 16, 1971), and remanding the case for reconsideration in the light of *Cohen v. Calif.* and *Gooding v. Wilson, supra;* and *Cason v. City of Columbus*, ___ U.S. ___, 34 L.Ed.2d 507, ___ S.Ct. _____(Dec. 11, 1972), reversing the judgment and remanding the case to the Supreme Court of Ohio. The *Papish* decision on March 19, 1973, reversing the dismissal of Susan Papish for violating the University of Missouri's General Standard of Student Conduct (decreed by the Student Conduct Committee, affirmed by the Chancellor and Board of Curators of the University, and as to which relief had been denied by the United States District Court for the Western District of Missouri, Central Division, and by the United States Court of Appeals for the

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[5] In *Lewis*, a police officer, while in the performance of his duty, was called "God Damn Mother Fucking Police" by the defendant, Mollie Lewis. This Court overruled the Louisiana Supreme Court's judgment which affirmed her conviction for a violation of New Orleans' Ordinance 828 M.C. S49-7, which provided as follows:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty . . . .

[6] *Brown* was convicted in the District Court of Tulsa County, Oklahoma, of a violation of 21 Oklahoma Statutes, Section 906, on an infomation which read as follows:

> ". . . that Wilbert Montell Brown . . . did unlawfully, and wilfully and knowingly, utter and speak obscene and lascivious words and language, to-wit: 'Mother-fucking fascist pig cops' and 'that black mother-fucking pig McIntosh,' in the Skap Chapel on the campus of the University of Tulsa in the City of Tulsa, Tulsa County, Oklahoma, the same being a public place and a place where numerous female persons were then and there assembled."

Eighth Circuit) continues the same erroneous line of reasoning which is common to *Cohen (supra), Gooding (supra), Kois (supra), Rosenfeld (supra), Lewis (supra), Brown (supra)* and *Cason (supra)* and undercuts the efforts of responsible educators in the schools throughout this nation to maintain a clean, wholesome educational environment in this nation's campuses, free from the corrosive force of obsenity.

Moving Party submits that Associate Justice Rehnquist's dissent is eminently correct in underscoring as manifest error, this Court's summary disposition of the case on an inadquate record. See page 5, of the slip opinion, where Justice Rehnquist states:

> ". . . I do not believe proper exercise of our jurisdiction warrants summary reversal in a case *dependent in part on assessment of the record and not squarely governed by one of our decisions.*" (Our emphasis.)

The Papish per curiam opinion and judgment is carved from an incomplete factual account which this Court has fabricated from the opinions of the District Court and Court of Appeals below. Unfortunately for this Court, the authors of the two opinions in the lower courts saw no need to emphasize the historical facts or chronology of events on the University of Missouri campus, or to justify the result reached there in terms of maintaining proper discipline and order on the Missouri Campus under the specific circumstances of Papish's prior conduct and willful defiance of reasonable regulations, clearly understood by her.[7] More succinctly, the record is

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[7]Prior to receiving a copy of the record which was before the Court of Appeals below (Appendix filed in the Court of Appeals for the 8th Circuit), Counsel for Moving Party had prepared a "Statement of Facts" from the facts appearing in the opinions of the court below. Upon examination of the record below, it became obvious that the "Statement of Facts" constructed from those opinions had to be scrapped as failing to accurately focus on the historical facts and chronology of events which faced the administrators of the University of Missouri - "gut" facts which were viscerally reacted to by the school administrators and, as a part of the record, by both of the Courts below, and formed a partial basis for the latters judgments of affirmance.

clear that, at the time Miss Papish did what she did, she knew beyond all doubt that what she was doing was in violation of the University Rules, but she willfully did it anyway. For this Court to say that, given these facts, her conduct is protected by free speech and is not subject to discipline, borders on the incredible.

Since the entire record was not before this Court, the Court lacked jurisdiction to rule on the merits. Rule 21(1) of the U.S. Supreme Court provides in part:

> "The entire record in the Court to which certiorari is addressed *shall be filed unless the parties agree that specified parts may be omitted* as unnecessary for the determination of the petition or of the writ, if it is granted."

Respondents herein *did not* enter into such an agreement. That the case was not properly before this Court is born out by Rule 21(2) which provides that:

> "Upon filing of the petition *and the certified transcript of record required by the preceding paragraph*, counsel for the petitioner shall enter his appearance and pay the docket fee." (our emphasis)

See also Supreme Court Practice, by Stern and Gressman, Fourth Edition, p 269 et seq:

> "Since the entire record is to be transmitted to the Supreme Court at the time of petitioning for certiorari, unless the parties agree to the omission of certain items, designation of items to be included in the record is no longer a limiting factor upon what the Court can consider. In the past a serious problem occasionally presented itself because of the absence from the record certified to the Supreme Court of important items in the record below. That problem should now arise even less frequently since counsel is not likely to stipulate to the omission of material upon which he will later rely should review of his case be granted. But if he finds that he did

originally agree to omit too much, or if the clerk below fails to transmit parts of the record, he can subsequently request that clerk to transmit the the omitted matter. See Sec. 6.17, infra.

The necessity for this Courts examining the certified record before ruling on the merits is reinforced by Rule 25 which states that upon the granting of the petition, "the clerk shall enter an order to that effect . . .*The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. . .*" (our emphasis).

More alarmingly, the per curiam opinions in *Papish* and *Kois, supra,* dealing with the problem of underground newspapers, have set into motion opposing forces which, under the line of reasoning developed in those decisions, this Court cannot hope to control in the future. Those summary dispositions do not begin to scratch the surface of this problem. Each member subscribing to those per curiam opinions should note with serious apprehension that the moral judgment pronounced therein is antithetical to the judgment which was arrived at four months earlier by an unanimous English Court of Appeal, dealing with a similar problem in England, in *R. v. Anderson et al.,* 3 All E.R. 1152 (Nov. 3, 4, 5,1972). See Count 3 and page 1158 of the *Anderson* opinion, a copy of which is attached hereto at Appendix A.

This Court's experiences in the motion picture area subsequent to its decision in *Jacobellisu v. Ohio,* 378 U.S. 184 (June 22, 1964) should serve as a warning that it cannot afford to embark on the course of abandon charted for the school systems by the *Papish* per curiam opinion. When, in 1962, the Ohio Supreme Court rejected the initial assault on public morals in the Ohio movies, Justice Radcliffe, speaking for the Ohio Court in *Jacobellis,* wisely applied the rule of law which holds that, "The law will rather permit a private

loss or damage than a public evil."[*] Unfortunately, this Court, after wrestling with the *Jacobellis* Appeal and that policy for two terms of Court, chose a different philosophy and a different course. *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.2d 793, 84 S. Ct. 1676 (June 22, 1964). As a result of *Jacobellis, supra*, and the 1967 per curiam opinions, such as *Redrup v. New York* 386 U.S. 767, 18 L.Ed.2, 515, 875 Ct. 1414 (May 8, 1967), hard-core films like "Deep Throat," "Animal Lover," "School Girl," "Sticky Situation," and "Adultery for Fun and Profit" now engulf the Nation and continuously instruct our citizenry in their seductive lessons of human perversion. See Brief Amicus Curiae of Charles H. Keating Jr. in *Heller v. New York*, No. 71-1043, at page 7, fn.

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[*] In *Ohio v. Jacobellis*, 173 O.St. 22, 68 Ohio Ops. 2d 207, 179 N.E.2d 777 (Jan. 17, 1962), Justice Radcliffe stated at page 779:

> "There is an oft-quoted cliche to the effect that 'it is not possible to legislate in the field of morals.' The statement originally was and still should be 'it is not possible to legislate morality for the people . . . .' We sorrowfully agree that this is true, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fibre resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to reelect or by direct referendum. It is infelicitous for the judicial branch of the government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure of mode of selection, consequently its authority must be exercised with deliberate caution. Lex citus tolerare vult privatum damnum quam publican malum (The law will rather permit a private loss or damage than a public evil)."

7-16.[9] Whereas, in 1964, Justices Brennan and Goldberg mistakenly believed that the High Court could control the "Pandora's Box" which it was about to open, experience has taught

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[9] The avalanche of pornography on the screen began with *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed.2d 793, 84 S.Ct. 1676 (June 22, 1964) which cleared the film, "The Lovers," Except for the two scenes of explicit sexual conduct, which the State of Ohio had objected to, "The Lovers" was a totally innocuous film which could have been exhibited to juveniles, without imparting scandal. The majority of this Court in *Jacobellis* failed to note that it carried a signal to every high-brow and low-brow producer of films.

Included in The Reply of Commissioner Charles H. Keating, Jr., dated Aug. 16, 1970, to the First Draft of the Legal Panel Report of the Commission on Obscenity and Pornography at Appendix B is a 40-page continuity (scenario and photographic) on the 16mm documentary motion picture film, "A Report On The United States Supreme Court And Its Recent Decisions In Obscenity Cases" (produced in 1968), which was exhibited to the Senate in connection with the nomination of Justice Fortas. See also Hearings Before The Committee On The Judiciary, United States Senate, 90th Congress, on The Nomination of Abe Fortas to be Chief Justice, Part I, July 11, 12, 16, 17, 18, 19, 20, 22 and 23, 1968, at pages 291, 1159 and Part 2, September 13 and 16, 1968, at page 1285. After the first showing of the 16mm work print to a group of about 20 U.S. Senators on Sept. 20, 1970, one of the questions asked by the Senators in attendance was, "What was responsible for the great change in the motion picture area?" To answer that inquiry, the portion shown in Commissioner Keating's reply of Aug. 16, 1970, at Appendix B, page 10 (supra) was added, reading:

> "Justice Brennan applied what he called 'national standards' to hold the film 'The Lovers ' not obscene -- a motion picture which for the first time was allowed to depict scenes of sexual intercourse -- in this instance, in a bed and bath between the wife and a casual house guest. A jury and the State of Ohio, speaking through three of its courts and 12 of its Ohio Justices, however, had held otherwise."

A copy of the 1968 documentary film, covering the cases decided during the 1966 October Term, was lodged with the Clerk of the U. S. Court as an exhibit to the Supplementary Brief in Support of Motion to Affirm in *A Motion Picture Film Entitled "Vixen" v. Ohio*, No. 71-599. (See Supplementary Brief at page 14.) Amicus earnestly solicits the Justices not sitting at that time, to screen that film so that, in weighing this Court's "experience," they might be supplied with certain "missing links" not available in the case reports.

otherwise. To date, this Court has not yet resolved the problem of how, in 1973, it can now close the lid on the box which it opened in 1964. At this late date, we cannot afford to carry the "experiment" over into the Nation's schools.

Wisdom has many times been defined as the application of knowledge. Amicus submits that, in deciding whether the *Papish* per curiam opinion should stand, this Court should compare the opposing philosophies expressed by the Ohio Supreme Court and the United States Supreme Court in *Jacobellis, supra*, and, in contemplating the end result achieved there, reflect upon the value expressed in that portion of the statement of University of Missouri Chancellor John W. Schwada in the trial court below. (See Statement of Facts, infra, at pages 22-25) reading:

> "The University has a vital educational interest in the forms of speech and press presentations employed by its students on the University campus. A significant function of the University is to further the concept of orderly, rational presentation of arguments pro and con on virtually all issues, and it is expected and generally believed that the educational community possesses exceptional ability to present and discuss issues without resort to the utilization of emotion producing, shocking, or indecent forms of speech. It is important that the University teach its students to discuss the issues utilizing socially accepted forms of speech. I know of no newspaper in general circulation in this state which has or would have printed the word raised in this case (and most especially in the manner it appears in the questioned publication), and the use of that or comparable words is not commonly accepted practice within the broader community. Additionally, the educational philosophy which prevails within the University communities asserts that learning is not

limited to the classroom alone, but takes place through the campus. If this proposition, supported by students and faculty, is true, then the University has, in my opinion, an appropriate concern with the quality of activities in the University community. The indiscriminate employment of indecent forms of speech in presenting issues for discussion on the University campus can be prohibited in furtherance of this educational philosophy."

In Moving Party's view, this Nation is facing a moral crisis of destructive proportions, which requires this Court to examine closely the testimony of Chancellor *Schwada* and Dean of Students *Jack Matthews* in the record below. That this Court should reject their sound reasoning without even reading their testimony, speaks poorly of this Court's regard for the appellate processes and the interest of the citizens of Missouri and other sovereign states in the moral environment their offspring are exposed to in state supported schools.[10] A comparison with the English Court's ruling in *Anderson, supra,* provides ample support for the assessment that this Court's summary rulings in *Kois, supra,* and *Papish, supra,* represent misjudgments of monumental magnitude. At the very least, those decisions deserve reconsideration by way of full briefing and argument on the merits, in order that the membership of this Court may be made aware of what is occurring on this Nation's campuses and elsewhere, under the guise of free speech.

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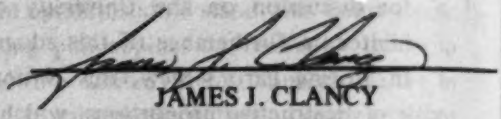
[10] This Court's reversal of those judgments is manifest error. Moving Party submits that if a majority of this Court, after examining the chronological account of the historical facts, including the statements of Chancellor Schwada and Dean of Students Matthews, as recited in the Brief herein, at pages 21 - 25, does not see fit to revise its judgment, then surely it is not unreasonable to conclude that those justices have failed to observe the "Good Behavior" required of all federal judges by Art. III, Sect. 1 of the Federal Constitution.

It is respectfully requested that the applicant herein be granted leave to file a brief amicus curiae in support of Respondents' petition for rehearing, setting forth arguments on the above and related issues and why further briefing and and argument should be had on the cause herein.

DATED: April 13, 1973.



JAMES J. CLANCY
Counsel for CDL.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-794

[redacted] SUSAN PARISH,

Petitioner,

vs.

BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Political Cures of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents' Petition for Rehearing

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STATEMENT OF THE CASE

Academic History of Miss Parish

Barbara Susan Parish, the petitioner in the federal courts, [redacted] pursued a 1958 academic degree from the University [redacted] at the time she was admitted to graduate

[redacted] as the record in the Court of Appeals are designated herein as [redacted]

It is respectfully requested that the applicant be granted leave to file a brief reply memorandum in support of Respondents' petition for rehearing, setting forth arguments on the above and related issues and why further briefing and argument should be had on the cause herein.

DATED: April 13, 1973.

JAMES J. CLANCY
Counsel for CDL

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-794

BARBARA SUSAN PAPISH,

Petitioner,

vs.

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents' Petition for Rehearing

STATEMENT OF THE CASE *

1. Academic History of Miss Papish

Barbara Susan Papish, the petitioner in the federal courts below, possessed a 1958 academic degree from the University of Connecticut at the time she was admitted to graduate

*Citations to the record in the Court of Appeals are designated herein as (Appendix, page ____).

school at the University of Missouri in September of 1963. For the next six years she attended school through the fall, winter and summer semesters and, at the time of her dismissal, which was effective on March 26, 1969, was making little, if any, significant progress toward the achievement of her stated academic objective. At the time of her dismissal, she was enrolled in a one-hour course entitled "Research Journalism" and in a three-hour course entitled "Ceramics 4." In the semester immediately preceding her dismissal, she was enrolled only in "Ceramics 3" (Appendix, pp. 48a, 49a). By letter dated Jan. 31, 1969, Miss Papish was placed on academic probation because of her prolonged submarginal academic progress, with the requirement that satisfactory work on her thesis be evidenced by presentation of several completed chapters of the thesis to her adviser by the end of the winter 1969 semester (Appendix, pages 16a,). On September 8, 1969, the Graduate School was notified by the School of Journalism that Miss Papish had not fulfilled the terms of her probation and that her candidacy for the Master's degree in Journalism had been terminated (Appendix 66a).

2. Disciplinary History of Miss Papish

In October of 1967, disciplinary charges were brought against Miss Papish alleging a violation of the general standard of student conduct embodied in Article V of the By-Laws of the University Board of Curators as her conduct related "to the distribution of 'New Left Notes' containing indecent words" (Appendix, page 42a). The charge arose out of an event which occurred on Oct. 14, 1967, University Day, while the University was engaged in an official activity of hosting high school seniors and their parents to acquaint them with the official educational programs and aspects of the University (Appendix, page 39a). *The specifications in 1967 for which she was found guilty (Appendix, page 42a) related to the distribution of "New Left Notes" containing indecent*

words, and read in part as follows (Appendix, pp. 39a-41a):

"1. Setting up and manning a table and distributing non-University publications in the area adjacent to the Memorial Union Tower area between the official University information table for University Day and buses used for campus tours in connection with University Day activity, thereby interfering with pedestrian traffic and obstructing University Day activities in this area after having been refused permission so to do and instructed and requested to cease and desist by University officials in the performance of their duties.

"2. Failing to comply with the requests of University officials in the performance of their duty to (a) vacate facilities reserved for use by University Day when requested to do so; (b) failure to cease distribution of non-University publications when requested to do so; (c) failure to identify yourself to a University official when requested to do so; (d) failure to exhibit your student identification card to a University official when requested to do so. * * * *

"5. Distributing non-University publications on University grounds titled 'New Left Notes,' published by Students for Democratic Society, containing pornographic, indecent and obscene words, 'fuck,' 'bull shit,' and 'shit's,' and 'The CIA at College: Into Twilight and Back,' containing a pornographic and indecent picture depicting two rats apparently fornicating on its cover to high school seniors and their parents who were the University's guests on University Day."

On November 1, 1967, the Faculty Committee on Student Conduct, consisting of 14 faculty members representing 14 Departments in 11 of the 16 Divisions of the University, after a hearing on the matter, found Miss Papish guilty of paragraphs 1, 2(a), 2(b) and para 5 as it related to the distribution of "New Left Notes" of the above specifications, and placed her on disciplinary probation for the remainder of her

student status at the University (Appendix, page 42a).

The "University Day" case, as it became known as, and the determination of the Faculty Committee on Student Conduct as to what constituted "indecent" forms of speech under Article V of the By-Laws of the Board of Curators were widely published and were well know on the campus. In February of 1969, they were personally known by Barbara Papish (Appendix, page 59a, Affidavit of Dean Matthews).

On February 11, 1969, approximately 15 months later, Ronald Pondrom, a law student at the University, made a complaint to Dean Matthews, the Dean of Students and the officer principally responsible for the administration of student discipline for initiating action against students (Appendix, page 56a), regarding literature then being distributed by the SDS at the information booth in the Memorial Student Union. The Memorial Student Union is referred to as the "crossroads" and the "living room" of the campus and it is through the Memorial Tower that virtually all student traffic between the Red and White Campuses of the University is funnelled at regular intervals during class breaks in the course of the ordinary University day. It is a place where students, prospective students, faculty, administrators, visitors, guests and family of the University community meet, congregate and visit between classes at the University, (Appendix, page 60a). Dean Matthews secured copies of the materials (Jan. 22, 1969 edition, Vol. 4, No. 3 of the SDS New Left Notes) being distributed and, after consulting with members of his staff and the University Legal Staff, and in view of the prior determination of the Faculty Committee on Student Conduct, determined that distribution of that publication contravened Article V of the By-Laws of the Board of Curators (Appendix, page 60a).

Dean Matthews then prepared a statement which read as follows (Appendix, page 61a):

"Members of the University SDS organization will

be permitted to continue with their scheduled use of information area space this morning. No objection will be interposed to the distribution of SDS literature, providing Article V of the By-Laws of the Board of Curators of the University of Missouri is not violated. (Section B of Article V states:)

"'Students enrolled in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe the GeneralStandards of Student Conduct. Obstruction of University teaching, research, administration or other activities, indecent conduct or speech, failure to comply with request of University officials, in the performance of their duties in violation of the laws of the city, state or nation are examples of conduct which contravene this standard.'

"The January 22, 1969, Volume IV, No. 3, edition of SDS-New Left Notes is not to be distributed. This particular issue of New Left Notes contains:

" 'Material' (Page 2 as an example) which contravenes the standards stated in Article V of the Board of Curators.

"Officers of SDS will be expected to appear before the Faculty Committee on Student Organizations, Government and Activities in the near future. The date for the meeting has not, as yet, been set.

"It is possible, as well, that students who can be identified as passing out publications containing 'vulgar' language may be invited to appear before the Faculty Committee on Student Conduct." (Our Emphasis)

On the following day, February 12, 1969, Dean Matthews ent to the Student Union and asked those manning the SDS ooth to accompany him into the adjoining room so that he

could read the statement to them privately and give them an opportunity to remove the publication, *page 2 of which contained a headline "Motherfucker Acquitted" without any reference thereafter appearing in the accompanying article (Appendix, page 62a).* A large crowd of students had gathered around the information booth, including the petitioner Barbara Papish. When *the people manning the information booth for SDS refused to accompany him to the adjoining room, Dean Matthews read the statement aloud, during which time Barbara Papish was present* (Appendix, page 62a). He specifically directed the attention of the group assembled to the headline "'Motherfucker Acquitted" and, without using the words, pointed out the headline as an example of that which would not be permitted to be distributed by SDS on the University of Missouri campus. His statement was recorded by local and student newspapers, radio and television media and received widespread publication and publicity (Appendix, page 62a). *Dean Matthews stated that it was his intention that, through his actions, all students would know that his direction related to the distribution of what he considered to be under the Board By-Laws an indecent form of speech.*

For several days thereafter the campus community widely discussed the Dean's action in the Student Union, and several confrontations relating to his statement forbidding the distribution of the material took place (Appendix, page 63a).

One week later, on February 19, 1969, at approximately 9:15 AM, Dean Matthews observed Herbert Markham and others actively selling copies of the February 1969, Vol. 4, No. 3 edition of the "Free Press Underground" *which contained on page 2 the same headline and the same article to which Dean Matthews, in the Student Union on February 12, 1969, had previously referred and had forbidden further distribution on the University of Missouri Campus.* The Dean purchased four copies from Markham and informed him he was in violation of the University rules and regulations prohibiting indecent speech. Markham left and went to the sidewalk adjacent to the apron.. (Appendix, page 63a)

Subsequent investigation revealed that Charles Fleisher, a Greyhound Bus Terminal employee, had loaded bundles of the "Free Press Underground" the night before into petitioner Papish's automobile, at Papish's request. (App. 63a)

3. The University Rule and Obscenity Charge

On March 12, 1969, Dean Matthews prepared a Notice of Disciplinary Charges and Hearing directed to Petitioner Papish, charging her with violating, on or about February 18 and 19, 1969, the General Standard of Student Conduct as set forth in Article V, Sections A and B of the By-Laws of the Board of Curators. (Appendix, page 64a) Paragraph B thereof reads as follows:

"Paragraph B: Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. Obstruction of University teaching, research, administration or other activities, indecent conduct or speech, failure to comply with requests of University officials in the performance of their duties and violations of the laws of the city, state or nation, are examples of conduct which would contravene this standard.

"This standard applies to all forms of student conduct and activity, and registration as a student constitutes full acceptance of the fundamental standard as well as other standards of conduct which may be adopted in implementation of this standard."

In the March 12, 1969 letter Miss Papish was charged with the commission of a second offense, while still on probation from punishment under the first offense. The letter charged her with:

"... violating on, or about February 18 and 19, at Columbia, Missouri, the General Standard of Student Conduct as set forth in Article V, Sections A and B of the

Board of Curators by failing to conduct yourself in a manner compatible with the University's functions and missions as an educational institution, in the following particulars:

> "*That while you were on a status of disciplinary probation you distributed* or aided and assisted in the distribution of the *Volume IV, No. 3, February 1969 edition of the Free Press Underground containing forms of indecent speech*, on the campus of the University of Missouri – Columbia, with knowledge of the contents of the publication, and *with knowledge that the Dean of Students had previously declared the forms of speech, therein appearing, indecent*, and distribution thereof improper on the University campus under existing rules and regulations.'" (Appendix, page 9a) (our emphasis)

On March 26, 1969, a hearing was held before the Student Conduct Committee, which included 11 faculty members representing 11 departments in 8 divisions of the University and two students serving as full voting members of the committee. Evidence was adduced and the findings and the determination of the committee was addressed in a letter to Barbara Susan Papish, dated March 27, 1969, dismissing her from the University. (A64a) *The committee's findings indicate that the existing disciplinary probation status was a factor in its decision* (Appendix, page 11a). The decision was appealed to the Chancellor of the University and then to the Board of Curators and affirmed in each instance.

4. The Claim of Original Jurisdiction

In August 1969 Miss Papish brought her action in the United States District Court for the Western District of Missouri against the University Board of Curators and against certain University officials. The complaint sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3), on the ground that Miss Papish's dismissal from the University was invalid

under the First and Fourteenth Amendments.

5. Dean Matthew's Trial Statement

The trial record shows that Dean of Students Jack Matthews stated as follows (Appendix, pages 64a, 65a) in support of the University disciplinary action:

"It is my opinion based on my twenty years' experience at the University as Dean of Students that the University has a legitimate interest in prescribing rules prohibiting the use of indecent forms of speech by its students and enforcing such a rule because indecent speech, in view of the free expression of ideas encouraged on the campus, disrupts students and the academic community and antagonizes citizens of this state who support the University. A large majority of our students, faculty, parents of our students and citizens of the state are not in sympathy with the distribution of materials containing indecent speech on the campus. Without their support, freedom of thought and expression cannot be effective on the campus. The regulation prohibiting indecent speech encourages, rather than discourages, freedom of thought and expression on the campus. It is necessary to preserve decorum and good order on the campus. High standards of conduct and behavior, especially in students' out-of-class activities and programs, must be maintained because it is usually the case that within the classroom there is little teaching done which relates to the improvement of the overall general character of the individual student. While not a great deal can be done in extracurricular activities to accomplish this, what can be done should be done, and the University must be constantly concerned with any behavior which has a tendency to lower the general standards of good conduct of our students.

"In my years of employment with the University, now numbering 35, and the last 20 years having been engaged as the Dean of Students in working very closely with students, faculty and staff, and in traveling around the state speaking to alumni groups and other types of organizations, I have been impressed with the loyalty of all the people with whom I have come in contact for their state university. There are many factors which have contributed down through the years to this high regard, respect and loyalty to the University. However, I believe one of the important factors in generating this feeling is the result of the fact that we have always tried to maintain on the University campus high standards of conduct for our students. I repeat, the strong support given the University down through the years, in my opinion, has a direct relationship to the manner in which the University has attempted to maintain the best possible climate or environment for our students. To seem to depart from the high purposes which we have held in the past by permitting on campus distribution of indecent forms of speech would have a bad effect upon the overall morale of the student body and our faculty as well and, in addition, we would lose much in the way of support from parents, alumni and the general public throughout the state."

6. Chancellor Schwada's Trial Statement

Also testifying in support of the University's action, Chancellor Schwada stated (Appendix, pages 53a-55a):

"8. In the event the Court should grant the preliminary injunction prayed for by Barbara Susan Papish in this case, pending its final disposition, such action would in my opinion be damaging to the University's educational philosophy and to its program of administration of student affairs on the campus. Such an action would open to question in the minds of students, faculty

and staff the validity of the rules and regulations and disciplinary arrangements within the University and would jeopardize the immediate effectiveness of the University's entire student affairs system by placing its validity in doubt. The entire University community would be left with questions as to the nature and basis for future University disciplinary actions at a time when the present fall semester is commencing, which would cause immediate and probably irreparable damage to the University. Additionally, in view of Plaintiff Barbara Susan Papish's previously displayed lack of urgency in securing her stated academic objectives, there would seem to me no sufficient reason for expediting her continued pursuit of her stated academic objectives in view of the immediate and irreparable damage which might result to the University if the preliminary injunction should be granted.

"9. The University has a vital educational interest in the forms of speech and press presentations employed by its students on the University campus. A significant function of the University is to further the concept of orderly, rational presentation of arguments pro and con on virtually all issues, and it is expected and generally believed that the educational community possesses exceptional ability to present and discuss issues without resort to the utilization of emotion producing, shocking, or indecent forms of speech. It is important that the University teach its students to discuss the issues utilizing socially accepted forms of speech. I know of no newspaper in general circulation in this state which has or would have printed the word raised in this case (and most especially in the manner it appears in the questioned publication), and the use of that or comparable words is not commonly accepted practice within the broader community. Additionally, the educational philosophy which prevails within

the University communities asserts that learning is not limited to the classroom alone, but takes place through the campus. If this proposition, supported by students and faculty, is true, then the University has, in my opinion, an appropriate concern with the quality of activities in the University community. The indiscriminate employment of indecent forms of speech in presenting issues for discussion on the University campus can be prohibited in furtherance of this educational philosophy.

"10. The general public expects, and rightfully so in my opinion, that although wide range of discussion of issues is encouraged by the University indecent forms of speech should not be employed in these discussions, and unless the University opposes the use of indecent forms of speech the public assumes that the University in fact supports, sanctions, endorses, and protects such forms of speech as part of the learning process within the University. The public reaction in this case was overwhelmingly in favor of the actions taken by the University. Of the something over 100 letters received, only 2 were in any way critical of the University's position, and most were warmly and vigorously in support of it. The University has a vital interest in encouraging the general support of the University by citizens.

"Additionally, if the University permits the distribution of indecent forms of speech on its campus, students accept that which is being distributed as in keeping with the University's attitude and philosophy toward the learning process.

"The University can legitimately expect, in my opinion, a higher standard of thought, expression and discrimination in the use and presentations of ideas than can be expected of the broader society beyond the campus.

Those in attendance are expected to be able to express themselves intelligently, and it is a legitimate purpose of the University to teach students how to discuss intelligently any issue utilizing generally accepted forms.

"11. A significant share of the students at the University of Missouri - Columbia have neither the years nor the experience of Barbara Susan Papish and therefore may not have yet gained the understanding and maturity essential to a careful analysis of that which they may read or hear. Seventy-two per cent of the undergraduate students enrolled on the Columbia campus last fall were under the age of 21 years, and over twenty-five per cent were first time freshmen directly out of the high schools of this and other states.

"12. In order to preserve and encourage within the University community the inordinately free expression of thoughts and ideas, the University may legitimately insist, in my opinion, as a very minimal restriction that the thoughts and ideas be expressed without the utilization of indecent and generally unacceptable forms of speech."

7. Miss Papish's Defense

Miss Papish's defense to the foregoing appears at paragraphs 3-8 of her verified affidavit, filed in the trial court (Appendix, pages 22-24):

"I am a member of the staff of the 'Free Press Underground,' a newspaper published by the Columbia Free Press Corporation, a non-profit corporation organized under the laws of Missouri. The 'Free Press Underground,' which has been published since 1965, disseminates news and opinion of general interest about University, local and world affairs. The paper generally is published monthly during the school year, and is distributed on the University campus and elsewhere. Written permission to distribute the paper on campus was obtained from

the Business Officer of the University on April 30, 1967, in accordance with University regulations."

"On February 19, 1969, I and a number of other students took part in the distribution of Volume IV, No. 3, February 1969 edition of the 'Free Press Underground' on the Columbia Campus of the University, in front of the Memorial Union. Although no disruption of the University's functions occurred in connection with the distribution of the newspaper, I and three other students who were involved in its distribution were arrested, at the instigation of the University.'[10A]

"The February 1969 edition of the 'Free Press Underground' contained two features which the University later contended were 'indecent.' The front cover duplicated a political cartoon which appeared in the February 1969 edition of 'The Movement,' a liberal paper of national circulation. The cartoon shows helmetted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice. The cartoon is captioned '. . . With Liberty and Justice for all' To me, the cartoon depicts and symbolizes the evils of authoritarian brutality. As I said in an article in the 'Free Press Underground,' 'Someone might consider the cartoon on the cover of this issue 'vulgar.' It is not; it is obscene. But it is a social comment concerning a greater obscenity. Chicago cops are obscene; napalm is the greatest obscenity of the 20th century; and administrators who fear a different view are also obscene.' The theme of the cartoon is purely political, and the University's act of labelling

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[10A] Miss Papish offered no evidence on this allegation, and both Chancellor Schwada and Dean of Students Matthews positively denied the University's participation in the arrests. (Appendix page 52a, 57a,)

it 'indecent' can be viewed as political censorship." "

"The second feature of the issue which the University objected to was an article concerning the acquittal of a young New Yorker after a trial for assault and battery by means of dangerous weapon. That article was reprinted from a political newspaper, the 'New Left Notes.' The article, which discussed the trial, the composition of the jury and similar matters, was headlined 'Motherfucker Acquitted.' The subject of the article is Ben Morea, the leader of a group in New York's Lower East Side called 'Up Against the Wall, Motherfucker,' also known as 'The Motherfuckers.' This group is an organization purportedly dedicated to the self-defense of poor people from police and bureaucratic harassment. The headline, 'Motherfucker Acquitted,' was intended to describe Morea's organizational affiliation. In that context, which should have been understood by our readers, the word 'Motherfucker' has absolutely no sexual or indecent connotations."

8. The Federal Decision's Below

The District Court denied relief on the grounds (1) that

"The statement of Miss Papish, made in her defense, that " . . . it is obscene. But it is a social comment concerning a greater obscenity," presents the same error in logic that some members of this Court have made. She suggests that when one is communicating, he or she may use obscenity for shock value to make a social point, like kicking a mule to get its attention. That principle, however, is the very opposite of what *Roth-Alberts*, 354 U.S. 476, 1 L.Ed.2d 1498, 1507, 77 S.Ct. 1304 (June 24, 1957) had to say. See *Roth-Alberts* at page 1507 where that Court cited and emphasized the following language of *Chaplinsky v. New Hampshire*, 315 U.S. 567:

"It has been well observed that such utterances *are no essential part of any exposition of ideas*, and are of such slight social value as a step to truth that *any benefit that may be derived from them is clearly outweighed by the social interest in order and morality* . . . . "

Miss Papish "does not have a federally protected or other right to attend a state university of a state of which she is not a domiciled resident or citizen" and (2) that "the conduct of plaintiff for which she was dismissed is not within First Amendment protection," and that the newspaper was obscene under federal standards, both as distributed and abstractly on the issue of obscenity vel non. *Papish v. Board of Curators of the University of Missouri*, 331 Fed. Supp. 1321, 1326 (1971).

In the Court of Appeals, Miss Papish mounted an attack on these findings along three principal lines: *First*, she asserted that her dismissal is improper because it rests solely upon her exercise of freedoms which the First Amendment guarantees. *Second*, it was argued that paragraph B of Article V of the By-Laws of the University Board of Curators is invalid because it is impermissibly vague, and because its language demonstrates a potential for sweeping improper applications posing a substantial likelihood of deterring important First Amendment freedoms. *Third*, the contention was made that Miss Papish's residence is irrelevant to her claim that University officials acted in violation of her constitutional rights. That being so, it was said that the District Court erred in its finding that Miss Papish was precluded from obtaining relief because, due to her Connecticut residence she did not possess a federally protected right to attend the University of Missouri. The Court of Appeals affirmed in *Papish v. Board of Curators of the University of Missouri*, 464 F.2d 136 (June 15, 1972), but did so on the limited ground that the magazine was obscene as "distributed on its open campus" without deciding the obscenity vel non issue. (ie. whether it must be made available in its book stores) See 464 F.2d 136, at 144, para. 3 and 145, first full paragraph.

8. The U.S. Supreme Court's Decision

On November 29, 1972, Papish filed a petition for writ of certiorari and on December 29, 1972, respondent filed a brief in opposition. On March 19, 1973, this Court (Chief Justice Burger and Associate Justices Blackmun and Rehnquist dissenting), without examining the record, granted the petition, reversed the judgment and remanded the case to the District Court with instructions to order the University to restore to petitioner any course credits she earned for the semester in question and to reinstate her as a student in the graduate program, unless she was barred from reinstatement for valid academic reasons.

REASONS FOR GRANTING REHEARING AND RESTORING CASE TO DOCKET FOR ARGUMENT

I.

PAPISH HAS FAILED TO STATE A CAUSE OF ACTION AS TO WHICH A FEDERAL COURT HAS ORIGINAL JURISDICTION.

(A) 42 USC Section 1983 Does Not Encompass A Civil Action To Review School Administrative Practices Where The Allegation of Due Process Denial Is Unrelated To Racial Discrimination.

1. The Jurisdictional Question Has Not Yet Been Decided By This Court.

In her petition for a writ of certiorari at page 1, Papish asserts 28 USC Section 1254(1) as the jurisdictional basis for this Court's review. But appellate jurisdiction to review a civil case in the Court of Appeals presupposes proper original jurisdiction in the federal court system in the first

instance. See *Farrell v. Joel, Jr.*, 437 F.2d 160 (2nd Cir. Jan. 20, 1971), a civil rights case based upon 42 USC Sect. 1983, to review school administrative practices, where Circuit Judge Feinberg, speaking for the Second Circuit (Lumbard, Feinberg, Clarie) noted at page 162:

> "Appellant assumes that her complaint states a viable action under the Civil Rights Act, 42 USC Sect. 1983 and its jurisdictional counterpart, 28 USC, Sect. 1343(3). It is a measure of the change in the law over the past decade that the defendants and the district court did not question this assumption . . . ."

The Second Circuit noted thereafter the unusual status of the law in the Eighth Circuit (where *Papish* was decided).

> "In the United States District Court for the Western District of Missouri, the four district judges *took the extraordinary step of convening an en banc court, which promulgated a General Order* on Judicial Standards of Procedure and Substance In Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 FRD 133 (W.D. Mo., 1968)." (Our emphasis.)

Unfortunately, the Second Circuit chose to avoid that issue, at page 162:

> "This Court does not seem to have ruled on the precise issue. See Madera v. Bd. of Education, 386 F.2d 778 (2d Cir. 1967), cert. denied 390 U.S. 1028, 88 S..Ct. 1416, 20 L.Ed.2d 284 (1968), but we will assume arguendo that due process applies where a publicly financed educational institution - whether college or high school - imposes a mild, as well as a severe, penalty upon a student."

That the scope of this problem is wide enough to warrant a more comprehensive review than was accorded herein, can be seen from the disagreement of federal judges as to the role of the federal court in such cases. Does the trial court "review

student discipline by school officials?" or is there a "separate proceeding which requires a trial de novo on the claim relating to a denial of federal rights?" See Circuit Judge Lay's dissent in *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1090, et seq. (8th Cir. Aug. 28, 1967). Moreover, if the proper procedure is "a plenary evidentiary hearing de novo" as Chief Judge Becker concluded in his trial court opinion, see *Papish v. Board of Curators of University of Missouri* 331 F. Supp. at 1323, has this Court acted properly in deciding this case without examining the *entire* record made in the federal district court? See Point II, Infra,

2. *The Congressional Purpose in Passing the Civil Rights Act of 1871 (43 USC Sect. 1983) was to Prevent Racial Discrimination. It Was the Intent of Congress at That Time That 43 USC Sect. 1983 Should Not be Interpreted as a General Federal Tort Law Authorizing Federal Lawsuits Against School Administrative Practices.*

To make the Federal District Court a trial court for every campus activity reaches a result never intended by Congress when it enacted the 1871 Civil Rights legislation. On this issue, the Court cannot avoid the implications of its rationale in *Griffin v. Breckenridge*, 403 U.S. 88, 29 L.Ed.2d 338, 91 S. Ct. 1790 (June 7,1971), where, in upholding federal jurisdiction under the Civil Rights Act of 1871 (43 USC Sect. 1985) in the case of conspiracies of private individuals to deprive the plaintiffs of civil rights involving racial discrimination, Justice Stewart was required to examine the congressional purpose behind such legislation and concluded that it was never the intent of Congress that the act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious discriminatory animus behind the conspirators' actions, at page 348:

"It is thus evident that all indicators – text, companion provisions, the legislative history – point unwaveringly to § 1985 (3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, *they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery* when committed by two or more persons within a State.' Id. at 485. The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a general federal tort law can be avoided by giving full effect to the congressional purpose – by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted supra, at 100 29 L.Ed.2d, at 347. The language requiring intent to deprive of equal protection, or equal privileges and immunities, means *that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action.* The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." (Our emphasis.)

Stewart grounded the 1971 decision upon three factors: (1) the plain language of 42 USC Sect. 1985; (2) *the statutory scheme of the 1871 Civil Rights Act, taken as a whole (42 USC Sect. 1983 and 1985) and (3) the legislative history of the Civil Rights legislation in 1871.* In examining the plain language of Section 1985, Stewart noted the failure to include the same phrase "under color of law," used in Section

1983, and remarked at page 345:

> "Indeed, the failure to mention any such requisite can be viewed as an important indication of Congressional intent to speak in Section 1985(3) of *all* deprivation of 'equal protection of the laws' and 'equal privileges and immunities under the law,' whatever the source."

Analysing the statute further, he examined the Civil Rights legislation *as a whole* (Sections 1983 and 1985) and noted at at page 346:

> "An element of the cause of action established by the first section, now 42 USC Sect. 1983, is that the deprivation complained of must have been inflicted under color of state law. *To read any such requirement into section 1985(3) would thus deprive that section of all independent effect . . . .* Given the existence of these three provisions, *it is almost impossible to believe that Congress intended, in the dissimilar language of that portion of section 1985(3) now before us, simply to duplicate the coverage of one or more of them . . . .*" (Our emphasis.)

It seems logical that if Sections 1985 and 1983 are to be read together and if it was never the intent of Section 1985 to reach other than "racial, or perhaps otherwise class based, invidious discriminatory animus" then certainly the reach of Section 1983 is not so broad as to make the federal district courts in Missouri trial courts to review de novo all school administrative practices in the state of Missouri.

II.

ASSUMING THAT A CLAIM HAS BEEN STATED AS TO WHICH THE FEDERAL DISTRICT COURT HAD ORIGINAL JURISDICTION, STILL THIS COURT ERRED IN REVERSING THE TRIAL COURT JUDGMENT WITHOUT EXAMINING THE ENTIRE RECORD UPON WHICH THAT JUDGMENT WAS BASED.

If this Court is dissatisfied with the law which the lower court has applied to the facts, as this Court has gleaned those facts to be from the opinions below (not all of the facts are recited in the opinions below), must it not then take a look at the *entire factual record* so that it may search for the correct rule of law which applies *to all of the facts?* The "per curiam" recitation at footnote 5 that "as the Court of Appeals' opinion states, 'The facts are not in dispute,' " completely ignores the fact that an appellate court is not justified in relying upon such unsupported "conclusions" in the opinion being reviewed where, as here, the record shows that the decision rests upon controverted facts. It is submitted that, in the decision making process, the per curiam justices cannot arrive at a judgment without examining *all* of the facts – and not all of the facts appear in the opinions below. It is not unreasonable to expect that several of the per curiam justices, when made aware of the true nature of the record and certain undisclosed facts, may reach a different conclusion on whether or not the facts are in dispute.

As just one example in support or this latter proposition, consider the factual issue as to what Miss Papish intended by the use of the "Motherfucker" article and why the bold headline was used. Was it legitimate journalism or was it open and wilful defiance of campus discipline and a libel by innuendo hurled at the School administration? In her af-

fidavit, Miss Papish stated (Appendix, p 24a):

"The headline, 'Motherfucker Acquitted' was intended to describe Morea's organizational affiliation. In this context, which should have been understood by our readers, the word 'Motherfucker' has absolutely no sexual or indecent connotations . . . ."

Dean Matthews, however, viewed the matter differently. In his affidavit (Appendix, page 62a), which is not mentioned in the opinion, he noted:

". . . page 2 of which contained a headline 'Motherfucker Acquitted' without any reference thereafter appearing in the accompanying article . . . ."

and on cross-examination, testified as follows (Appendix, page 94a) (also not mentioned in the opinions):

" Q. Yes, Sir, and in making that decision did the context in which that particular word appeared, was that significant to you?

" A. It seemed to be totally unrelated to the material below the headline. And it seemed to have no relationship and it seemed to be in the paper for some – I don't know why . . . ."

Amicus submits that when Miss Papish's explanation is viewed in the background of her repeated wilful defiance of authority on the University of Missouri campus,[12] it is obvious that she is speaking with a "forked tongue" and that in truth, the headline was intended as a libel by innuendo on the school

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[12] See Statement of facts, supra at pages 14 - 19. Note that Miss Papish introduced the term *three times* to the University campus. On cross examination Dean Matthews stated that it was also the subject of the 1967 charge. "So . . . I made a judgment on what I saw and the lack of relationship *and the use of these, of this word, which, as I repeat, had already been judged indecent* by Faculty Committee representing, I believe 14 of our 16 divisions on the campus in *1967* . . ." (our Emphasis) (Appendix, page 94a).

administration. To find the answer to this question and the real reason for the article, the members of this Court need look no further than the record and plaintiff's own evidence in the trial court below. In Plaintiff's Exhibit 1, the author of the Atlantic Monthly article, in tracing the use of that obscene term by the SDS, suggests that what Miss Papish "mouthed" is really window dressing and camouflage, commonly known as *"a public explanation"*, and that the *real popularity of the slogan* on the campus lay in the students' "feelings about their adversaries,:: - "police, city officials, administrators, and faculty." See Plaintiff's 1, appearing at Appendix 146A (No mention having been made of it in the opinions):

". . .I make no claim to full understanding of the complete psychological and cultural journey this phrase has undergone. But let me at least sketch in a few steps along the way: . . ."

"6. *The slogan's full flowering* during the course of the Columbia strike, both in abbreviated and complete form, in shouted student chorus, for confronting just *about all representatives of what was considered negative authority – police, city officials, administrators, and faculty.* Rudd has claimed that his group adopted the slogan 'in order to demonstrate our solidarity with the blacks and our understanding of the oppression they have been subjected to.' *But other student-strikers told me this was 'a public explanation.' They attributed the slogan's popularity to the students' general mood and feelings about their adversaries; and also to the presence of a few members of the East Village group.* One, known as John Motherfucker, was constantly in view, wearing his 'club jacket' with the organization's name lettered on it, and advocating even greater militancy. He became an object

of both humor (other students thought his ideas 'crazy') and affection." (our emphasis)[13]

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[13] If the Per Curiam opinion is to stand, what can the University of Missouri administration do when the "John Motherfucker" club jackets appear on the campus? See Motion of Charles H. Keating Jr. for Leave To File a Brief as Amicus Curiae In Support of Appellee's Petition for Rehearing in *Cohen v. California*, Oct. Term 1970 No. 299 at page 5 wherein the following argument appears:

> If, in spite of this nation's laws outlawing "lewd conduct", an individual has an absolute right to broadcast to the public his opposition to any cause or principal by employing lewd language such as "F__the (cause or principal)" and "the State may not, consistently with the First and Fourteenth Amendment, make the public display of such a single four-letter expletive a criminal offense" and the public (in this case, those in the Los Angeles Court House) are required to "avoid further bombardment of their sensibilities simply by averting their eyes" because the state cannot "forbid particular words without also running a substantial risk of suppressing ideas in the process" then surely Justice Harlan's opinion has opened Pandora's Box, and in the same stroke succeeded in painting this Court into a corner. See Rule 40(5) of the Rules of the Supreme Court of the United States which provide in part, as follows:
>
> "5, Briefs must be . . . free from . . . scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court . . ."
>
> In the light of the *Cohen* rationale, how can this Court justify the limitations on free speech imposed by Rule 40(5)—particularly, in light of the fact that the business of the Supreme Court offers a forum which symbolizes the essence in the exchange of ideas. If the State cannot regulate objective "lewd conduct" in the public corridor of its buildings, how can this Court accomplish that task in its own Courtroom "without also running a substantial risk of suppressing ideas in the process?" or, as in the case of the legendary fable of "The Partial Judge," does the answer to the constitutional question depend upon whose ox is gored. What is this Court prepared to say the rule of law will be when some disgruntled person, be he litigant or observer, decides to don his jacket in the manner of Cohen, and broadcast a message to the members of this Court and the spectators in attendance. This is not a fanciful inquiry, for only a naive person would fail to recognize the historical significance of the tool of "lewdness" as an instrument of revolution. See *Dillingham v. State of Maryland*, 267 A. 2d 277 (July 15, 1970) where the editor of the Washington Free Press resorted to "lewdness" in his attack on a trial judge."

III.

THE PER CURIAM OPINION IS IN ERROR IN REFUSING TO LOOK AT THE RECORD AND IN CONCLUDING, FROM THE LIMITED FACTS WHICH APPEAR IN THE OPINIONS BELOW, THAT "THE STATE UNIVERSITY ACTION CANNOT BE JUSTIFIED AS A NON-DISCRIMINATORY APPLICATION OF REASONABLE RULES GOVERNING CONDUCT."

A. The Record Presents an Obscenity Case Involving Unlawful Student Conduct, and All Three Agencies: The University, The District Court and the Court of Appeals Treated It As Such in Their Rulings on The Matter.

1. The Obscenity Issue: Underground Newspapers.

Contrary to what one would be led to believe from a reading of this Court's per curiam opinion, the *Papish* case, properly interpreted, focuses on a major obscenity issue not heretofore considered by this Court in oral argument; namely (1) how to treat the underground publications whose publishers incorporate obscene articles as a part of the whole for the purpose of attracting attention to political arguments made therein, and (2) how to treat the distribution of such publications by vendors, when they are sold and distributed, both with knowledge of the contents and with such "pandering" purpose in mind.

As to the first problems, dealing with the "publisher", see the problem in a nutshell in *Joseph R. Kois v. Breier*, 312 F.Supp. 19 at pp. 24, 25 (May 5, 1970), where Judge Reynolds recognized the problem but failed to comprehend the solution. Compare the scandal-giving result reached by this Court in *Kois v. Wisconsin*, 408 U.S. 229, 33 L.Ed.2d 312, 92S.Ct____(June 26, 1972), arrived at without brief-

ing or oral argument (and, it is submitted, without adequate reflection on the merits) with the praiseworthy solution arrived at by England's highest court in the celebrated "Oz" case in *R. v. Anderson and others*, 3 All E.R. 1152 (Nov. 3, 4, 5, 1972), a copy of which is attached hereto at Appendix A. It is unfortunate that when *Kois, supra*, was first considered by this Court in conference last term, there were not the required four votes to call for full briefing and oral argument on the merits on this major issue in the first instance.

The latter problem, involving "vendors" was the obscenity issue which faced the University of Missouri officials on the campus and, contrary to the conclusion drawn in the per curiam opinion, *that was the matter decided by both the District Court and the Court of Appeals below.*[14]

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[14]The per curiam statement at page 3 that: "The District Court's Opinion rests, in part, on the conclusion that the banned issues of the newspaper was obscene. *The Court of Appeals found it unnecessary to decide that question . . . .*" (Our Emphasis.) ignores the plain language of that opinion and indicates that the author completely misunderstood the language employed by, and the analysis of, the Court of Appeals, which differed only slightly from the District Court's analysis. There is a basic difference between "obscenity vel non" or "constant" obscenity concepts and "variable" obscenity concepts, the latter of which comes into clear focus when one tests the constitutionality of any statute, ordinance, or rule as applied, specifically, to a given subject matter in terms of time, place and manner of distribution, which is what the Court of Appeals decided. See *U.S. v. Rebhuhn*, 109 F.2d 512, cited with approval in *Ginzburg v. U.S.* 383 U.S. 463 at 472.

Although the per curiam opinion recognized what the Court of Appeals was saying, *its fatal error was in its failure to look beyond the facts set forth in the opinion to the record itself.* See page 4, where the per curiam opinion observes:

> "There is language in the opinion below which suggests that the University's action here could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination. While we have repeatedly approved such regulatory

2. The District Court Solution.

District Court Judge Becker analyzed the trial facts as presenting a *Ginzburg v. U.S.*, 383 U.S. 463, 16 L.Ed.2d 3, 86 S.Ct. 942 (March 21, 1966) type obscenity case involving "pandering" [18] and held that, since it was clear that the *obscene portion* of the newspaper was used to

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authority, e.g., 408 U.S. at 192-193, *the facts set forth in the opinions below* show clearly that petitioner was dismissed because of the disapproved content of the newspaper rather than the time, place or manner of its distribution."
(Our emphasis.)

Amicus submits that the Court had a clear duty to examine the record in the trial court and come to its own conclusions.

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[18] Beyond doubt, the most incomprehensible part of the per curiam opinion appears in footnote 6, containing the per curiam's reply to Justice Rehnquist's dissent that Papish was engaged in "pandering" and reading:

"The opinion (District Court) makes clear, however, that the reference to 'pandering' was addressed to the content of the newspaper and to the organization on the front page of the cartoon and the headline, rather than to the manner in which the newspaper was disseminated . . . ."

Amicus is able to perceive no difference between Ralph Ginzburg's "chip on the shoulder" attitude in mailing his sexually oriented publications "Eros," "Housewife's Handbook on Selective Promiscuity" and "Liaison" to priests, nuns, rabbis, community organizations, boy scout groups, etc., in defiance of community standards, and Susan Papish's distribution of the Free Press underground magazine with headline and other gross content like "Motherfucker Acquitted," at the crossroads of the University of Missouri campus (where the offsprings of the families of this Nation are assembled for the purpose of betterment) in repeated, deliberate defiance of the University of Missouri's rules of conduct on the campus.

The reason for including such sexual content in underground newspapers is a matter of common knowledge and differs not from Ginzburg's motives. In Issue Number 1 of the Students Resistance Federation, published in New York City, with mailing address, "Free Student," c/o Apt. 4, 336 East 4th St., New York 9, N.Y., dated March 1964, the following advice appeared:

"pander" the publication, taking into account the age of the enrollment at the University (Footnote 6 of his opinion reads, "University records show some 1031 students enrolled for the 1968 Fall Semester under 17 years of age), *Papish* had no constitutional right to disseminate her *entire* "publication *anywhere* on the University of Missouri campus. In this regard, compare the approach employed by the English Court of Appeal in *R. v. Anderson et al.*, at page 1158, a copy of which appears herein at Appendix A, with the analysis and result reached by Judge Becker in *Papish v. Board of Curators of University of Missouri* 331 F. Supp. 1321 at 1329.

"The Students Resistance Federation is a student federation organized to promote libertarian alternatives to the existing authoritarian teacher-pupil relationship prevalent in the private boarding and day school systems in the U. S. Recognizing that an unrestricted atmosphere of enquiry and debate is the only basis for a free and human education, we reject, and shall fight on the campuses, if necessary, all restrictions on sexual freedom, compulsory religious worship . . . basic civil liberties, and the dictatorial faculty and headmaster control . . . ."

"What can we do? First, of all, organize. GET WISE-- ORGANIZE! They are, — so why shouldn't we? Then try some of the following to begin with:

–Boycott the farcial 'student council' elections.

–Boycott the school stores, snack shops, etc. Most of them charge too damn much anyway. Have the students buy on the outside.

*–Pressure the librarian into buying some good pornography for the school library. If he refuses, bring it in yourself.*** If you can really get organized on your campus, and built a majority of the students behind you, you can try the following for good results:*

–Publish an insulting satire magazine. You can do this anyway, in secret, if you have to.

–Mass boycott of daily and/or Sunday chapel until the administration makes religious worship strictly voluntary.***"
(Our emphasis.)

Those members of this Court who do not recognize the above type of conduct as "pandering" are indeed naive.

"The maintenance of a decent atmosphere in the area of Memorial Tower and the adjacent Student Union and chapel, and the protection of persons there from pandering indecent publications is a lawful mission of the University. Further, it is apparently plaintiff's conclusory contention that the distributed material is not 'obscene' because, in accordance with the opinion of her witnesses, the material had, in terms of Roth, 'redeeming social value.' As noted above, in considering what is obscene, this Court may take into account what is emphasized in the sale and distribution of the materials by the purveyor of the allegedly obscene materials. In Ginzburg v. United States supra, 338 U.S. at 465, 86 S.Ct. at 944, 16 L.Ed.2d at 35, the United States Supreme Court held that 'the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity.' Further, in Ginzburg, it was the ruling of the Supreme Court that, even in the case where a book may have social worth in a 'controlled, or even neutral, environment,' the work was without the ambit of First Amendment protection when:

> " 'Petitioners * * * did not sell the book to * * * a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed. They proclaimed its obscenity, * * *' "

In Gable v. Jenkins (N.D.Ga.) 309 F.Supp. 998, affirmed 397 U.S. 592, 90 S.Ct. 1351, 25 L.Ed.2d 595, the rule of Stanley v. Georgia, supra, was held not to invalidate a Georgia statute forbidding the dissemination of 'obscene materials' by any person. The same is true in this case, particularly with regard to the news story headlined,

'Motherf _____ Acquitted.' Assuming, without holding, that the story itself may be of redeeming social importance, that aspect was not made most prominent by the arrangement of the news article; rather, the obscene aspect was emphasized and featured in bold face type. The cartoon of policemen raping the Statue of Liberty and the Goddess of Justice features the crude, vulgar and obscene, obscuring any political or social commentary which might incidentally be made. This is particularly true in the University environment in which a substantial portion of the University population is under the age of 18 years and thus does not constitute the 'controlled environment' in which such a cartoon might be considered as predominantly a social commentary. The University community, which is mainly comprized of younger and less sophisticated persons than those mature persons who are interested in social comment, would not constitute a 'controlled environment.' "

3. The Court of Appeals Solution.

The Court of Appeals, on the other hand, decided the case on a much narrower "obscenity" grounds. Since the attack was being made on the constitutionality of the University of Missouri obscenity rule *as applied* to Miss Papish's distribution of her publication, the Court of Appeals refused to rule on the application of the rule beyond the factual situation and circumstances being reviewed in the lawsuit, *U.S. v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524, 529 (Feb. 29, 1960), in holding that under the facts presented, Papish had no right to sell or distribute such a publication on the "open campus," where the University administrators had found the same to be against the conventions of decency in the use and display of language on a University campus. The Court refused to consider whether she could be denied a constitutional right to sell the paper elsewhere

on the campus, such as at the bookstore, since it had been stipulated that the University had granted that permission. *See Papish v. Bd. of Curators*, 464 F.2d 136 at 145, where the Court of Appeals states:

"We express no view as to whether the Free Press Underground contained materials which can be adjudged obscene *per se* under contemporary legal standards. . . ."

and 464 F.2d 136 at 144:

"Nor does the record evidence reveal that she unsuccessfully sought permission to sell her publication in the University bookstore. What the record does reflect is an application[19] of the rule to discipline Miss Papish for the manner in which she sought to exercise her rights. . . ."

19. Indeed, the parties have stipulated that the University had granted permission to the Free Press Underground to sell its publication on campus. That being so, there is little basis upon which to conclude that the University would entirely close the door to campus distribution . . . ."

B. The University of Missouri obscenity rule is constitutional on its face.

Susan Papish was charged by the University of Missouri with a violation of the University of Missouri obscenity rule:

". . . violating on, or about February 18 and 19, at Columbia, Missouri, the General Standard of Student Conduct as set forth in Article V, Section A and B of the By-Laws of the Board of Curators by failing to conduct yourself in a manner compatible with the University's functions and missions as an educational institution, in the following particulars:

"That while you were on a status of disciplinary

probation you distributed or aided in the distribution of the Volume IV, No. 3, February 1969 edition of the Free Press Underground containing forms of indecent speech on the campus of the University of Missouri - Columbia, *with knowledge of the contents of the publication, and with knowledge that the Dean of Students had previously declared the forms of speech, therein appearing, indecent, and distribution thereof improper on the University campus under existing rules and regulations.*" (our emphasis).

(1) The word "indecent" as used in the rule and applied in this case, provides a reasonably ascertainable standard of guilt.

As pointed out by the District Court at page 1320, the words "indecent" and "obscene" are interchangeable:

> "First, it should be noted that the words 'indecent' and 'obscene' are frequently used to express the same meaning, 50 Am. Jr. 2d, Lewdness, Indecency and Obscenity, § 2, pp. 451-452; 20 A Words and Phrases, pp. 520-524. In this case there was evidence of offensive aggressive actions to press this offensive, indecent, vulgar publication on a captive audience, including persons under 18 years of age, in a hallowed place . . . ."

Chief Judge Becker's opinion could have cited a more impressive authority – the express holding of this Court in *Roth-Alberts*, 354 U.S. 476, 1 L.Ed.2d 1498, 1510, 1511, 77S.Ct. 1304 (June 24, 1957) that "indecent" and "obscene" were legal synonyms which, when applied according to the proper standard for judging obscenity, gave adequate warning:

> "It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due pro-

cess. Winters v. New York, 333 U.S. 507, 92 L ed 840, 68 S Ct 665. The Federal obscenity statute makes punishable the mailing of material that is 'obscene, lewd, lascivious, or filthy . . .or other *publication of an indecent character.* The California statute makes punishable, inter alia, the keeping for sale or advertising material that is *'obscene or indecent.'* The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.

"Many decisions have recognized that these terms of obscenity statutues are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . The Constitution does not require impossible standards;' all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .' United States v. Petrillo, 332 U.S. 1, 7, 8, 91 L ed 1877, 1883, 67 S Ct 1538. *These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed* and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' Id. 332 U.S. at 7. . . .

"In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." (our emphasis).

(2) As Interpreted Herein, the Missouri Obscenity Rule Satisfies the Constitutional Requirements re Mens Rea and Burden of Proof.

The Missouri obscenity rule presents none of the "scienter" problems presented by the Los Angeles Ordinance in *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L.Ed.2d 205. Nor does it involve questions regarding the state of the "mens rea" requirement which stalemated this Court in *Redrup v. New York*, 386 U.S. 767.[16] Whether the campus rule might be applied and penalties inflicted thereunder utilizing a lesser means rea and burden of proof than would be acceptable to this Court, is not an issue in as much as the charge laid against Miss Papish pleads actual subjective knowledge and wilful misconduct. See page 19 and that portion of the charge reading:

". . . with knowledge of the contents of the publication *and with knowledge that the Dean of Students had previously declared the forms of speech, therein appearing, indecent . . . ." (Our emphasis.)*

Compare *General Trust Co. v. Blodgett*, 287 U.S. 509, 513; *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688. Further, as the facts noted in III C, *infra*, above clearly point out, the burden of proof to satisfy the wilful misconduct alleged is clearly established.

C. *The Record Which This Court Failed to Examine, Reflects That the University of Missouri Obscenity Rule Was Applied in a Constitutional Manner to Miss Papish's Conduct on the Open Missouri Campus.*

The trial court record reveals that Miss Papish was charged with employing obscenity on the Missouri campus in 1967,

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[16] For an analysis of the stalemate reached as to the state of the "mens rea" requirement, see Brief Amicus Curiae of Charles H. Keating, Jr. in *Grove Press, Inc. v. Flask*, Oct. Term 1970, No. 360, at pages 112-123.

tried by a self-governing body of fact finders, and found guilty of the charge. (See pages 14 - 16). On February 11, 1969, while on probation from that sentence, she again engaged in the same obscenity in the same area of the campus, for which she was, on the following day, served a written warning by the Dean of Students. (See pages 16 - 18) Notwithstanding the former notices that such conduct was in violation of the University Standards of Conduct, she again, one week later, repeated the same identical conduct for which she was again charged and found guilty, after a proper hearing on notice, by the same independent, selfgoverning body of fact finders. (See pages 18 - 19)

There is evidence in the record (Plaintiffs 1) that the obscene term "motherfucker", whiich was used by Miss Papish on all three occasions was an obscene term of derision which was employed by the SDS and was recognized on the campus as a libel by innuendo on the school administration. (See pages 36 - 37) Further, the factual issue raised by Miss Papish, as an affirmative defense, that the use by her was solely in a journalistic sense, was controverted by the testimony of Dean of Students Matthews, who saw no connection between the bold headline and the accompanying story. (See page 18.)

D. *This Court Should Adopt the Rule of Law Laid Down by the English Courts in R. v. Anderson et al. That "Where One Has an Article Such as This Comprising a Number of Distinct Items, the Proper View of Obscenity . . . is to Apply the Test to the Individual Items in Question. It is Equally Clear That if, When so Applied the Test Shows One Item to be Obscene That is Enough to Make the Whole Article Obscene. ."*

If the six justices of this Court who subscribed their names to this opinion, which holds as it does that "neither the political cartoon nor the headline story involved in this

case can be labeled as constitutionally obscene or otherwise unprotected" did so with full knowledge of the factual account recited herein at Point III C, *supra* (see page 47 et seq.) then, "God Help This Nation!" for surely this Court has gone too far.[17] If such a situation exists, then it is time for the Legislature and others to move to correct what is

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[17]Counsel for Amicus recognizes the importance of submitting ones self to lawful authority within the judicial system, having been well schooled in that general principle during undergraduate training at the U.S. Naval Academy over 30 years ago. Indelibly committed to memory is the colorful advice of Lt. Wilson offered during one of the final year's leadership classes that "If the captain of the destroyer gives you an order, as First Lieutenant, to paint the smoke stack pink,---paint it pink."At the same time, however, a practical limitation on that general rule was learned during World War 2 submarine service from a reported account in the patrol report of a sister ship in the squadron, which involved the medical locker on board that submarine. Traditionally, the key to the medical locker of U.S. submarines, which was stocked with several fifths of whiskey for emergency use, was in the possession of the commanding officer. The report to the Commander-in-Chief of Submarines for the Pacific Fleet recounted the Executive Officer's (second in command) having gone to the bridge one morning to find the Commanding Officer in an inebriated condition and interfering with the routine predawn dive which had been scheduled to commence the submerged daylight patrol. Although the foundations of the submarine service were shaken for a while as the pros and cons were debated as to what the true facts were, and the correctness of the Executive Officer's actions in taking the keys to the medical locker away from the commanding officer, it has always seemed to the undersigned, judging from the past performances of the persons involved, that the second officer acted properly. Thirty years later, the undersigned having observed the past ten years of this Court's destructive interference with the attempts of state law enforcement and state courts to maintain high public morality thru the regulation of obscenity, culminating in this Court's recent unreasonable interference in breach of the peace and disorderly conduct matters, in *Cohen, Wilson, Kois, Rosenfeld, Lewis, Brown* and finally here in *Papish*, is forced to make the observation to this Court that, in his opinion, a majority of this Court, is unlawfully at the liquor locker, and it is time to let the state courts, take over the policing of such matters. See Justice Harlan's concurring opinion in *Alberts v. California* 354 U.S.476 at 501.

certainly a flagrant abuse of raw power.

Amicus would sound a warning for this Court that it has not scratched the surface of this problem. In *Kois, supra,* and in *Papish,* the Court has set into motion opposing forces which it cannot possibly contain under the rationale of those cases. Kois' "Kaleidoscope" and Papish's "Free Press" are the advance guard to the "Screw" variety viewed by this Court in *Milky Way Feed Co., Inc. v. Leary,* affirmed on the merits in 397 U.S. 98, 25 L.Ed.2d 78, 90 S.Ct. 812 (Feb. 27, 1970) and presently before this Court in *Mohney v. Indiana,* No. 71-1347, petition for certiorari filed April 19, 1972. This more modern type of underground newspaper, and a host of others equally as bad, now appear in the street corner vending machines and on the Nation's campuses, thru the courtesy of this Court.[18] Amicus submits that the carte blanche offer expressed in *Kois* and *Papish* to the publishers of "Screw" and other equally perverted magazines, is an unreasonable exercise of judicial power which, when coupled with the turmoil which those decisions has unleashed on the university campuses and elsewhere, is certain to invoke counter movements demanding political and judicial checks of the order discussed by the Murphy and Pritchett text "Courts, Judges and Politics" at pp. 547-562.

Because the English solution in *R. v. Anderson et al.* is so at odds with the values expressed by this Court in *Papish,* and because Count 3 of *Anderson,* dealing with "obscene or indecent" matter is so akin to the underlying problem of "indecent conduct or speech" in *Papish,* and this Court's

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[18]As a representative example, see the San Diego Union News item of Apr. 3, 1973, involving a high school campus, and the Costa Mesa Daily Pilot News Report of Mar. 26, 1973, involving a small community of less than 40,000, reproduced herein at Appendix B, pp. 2,3.

specific holding on "indecent or obscene" in *Roth-Alberts*, 354 U.S. 476, at 491, 492, 1 L. Ed.2d 1498, 1510, 1511, 77 S. Ct. 1304 (June 24, 1957), (see pp. 45, *supra.*) the opinion in *R. v. Anderson et al.* is reproduced herein in full at Appendix A for this Court's convenience of reference and consideration for adoption.

If this Court will but for a moment reflect on the underground newspaper and its inherent problems, and project those issues into the foreseeable future, it must see that there is only one path for this Court to take and that is in the direction of *R. v. Anderson, supra*, and the rule of law laid down by the English Court at page 1158:

> "It is in our view quite clear from s 1 that where one has an article such as this comprising a number of distinct items, the proper view of obscenity under s 1 is to apply the test to the individual items in question. It is equally clear that if, when so applied, the test shows one item to be obscene that is enough to make the whole article obscene. Now that may seem unfair at first reading but it is the law in our judgment without any question. A novelist who writes a complete novel and who cannot cut out particular passages without destroying the theme of the novel, is entitled to have his work judged as a whole, but a magazine publisher who has a far wider descretion as to what he will, and will not, insert by way of items is to be judged under the 1959 Act on what we call the "item by item" basis. This was not done in this case. Our main concern in mentioning the point now is to ensure that it will be done in future. To consider the article as a whole did no harm to the defence in the present case, but the proper course to be taken in future is the item by item approach for magazines and other articles comprising a number of distinct items."

If the members of this Court are concerned with the plight of Miss Papish, then surely it, like the English Court in *Anderson*, has the necessary legal tools for preventing her from becoming a sacrificial lamb in the establishment of a new obscenity rule which applies an item by item approach for magazines. Amicus submits that such a rule is not without precedent in the federal court system. See *Flying Eagle Publications Inc. v. U.S.* 285F2 307, 308 (January 10, 1961).

IV.

TO RULE ON THE MERITS OF THE CASE WITHOUT EXAMINING THE ENTIRE RECORD IN THE COURT BELOW WOULD BE A DENIAL OF DUE PROCESS OF LAW.

Since the entire record was not before this Court, the Court lacked jurisdiction to rule on the merits. Rule 21(1) of the U.S. Supreme Court provides in part:

> "The entire record in the Court to which certiorari is addressed *shall be filed unless the parties agree that specified parts may be omitted* as unnecessary for the determination of the petition or of the writ, if it is granted."

Respondents herein *did not* enter into such an agreement. That the case was not properly before this Court is born out by Rule 21(2) which provides that:

> "Upon filing of the petition *and the certified transcript of record required by the preceding paragraph,* counsel for the petitioner shall enter his appearance and pay the docket fee." (our emphasis)

See also Supreme Court Practice, by Stern and Gressman, Fourth Edition, p 269 et seq:

> "Since the entire record is to be transmitted to the Supreme Court at the time of petitioning for

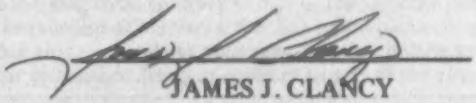
certiorari, unless the parties agree to the omission of certain items, designation of items to be included in the record is no longer a limiting factor upon what the Court can consider. In the past a serious problem occasionally presented itself because of the absence from the record certified to the Supreme Court of important items in the record below. That problem should now arise even less frequently since counsel is not likely to stipulate to the omission of material upon which he will later rely should review of his case be granted. But if he finds that he did originally agree to omit too much or if the clerk below fails to transmit parts of the record, he can subsequently request that clerk to transmit the omitted matter. See Sec. 6.17, infra.

The necessity for this Courts examining the certified record before ruling on the merits is reinforced by Rule 25 which states that upon the granting of the petition, "the clerk shall enter an order to that effect . . .*The order shall direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ. . .*" (our emphasis).

CONCLUSION

This case should be ordered restored to the docket for reconsideration by way of briefing and further argument on the questions presented herein. In the alternate, the petition should be dismissed as being improvidently granted.

Respectfully submitted,



JAMES J. CLANCY
Counsel for Amicus Curiae

Appendix A

Opinion of Court of Appeal,
Criminal Division (Lord Widgery,
C. J. James and Bridge, J. J.) in
R. V. Anderson 3 All E.R. 1152
November 3, 4, 5, 1971 55-65

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ed that in the circumstances the court would grant leave to appeal against sentence a
would treat the hearing of the application as the hearing of the appeal.]

eal allowed, but sentence in its totality to stand.

itors: *Registrar of Criminal Appeals* (for the appellant); *A J Olson*, Durham (for the wn). b

N P Metcalfe Esq Barrister.

R v Anderson and others

c

RT OF APPEAL, CRIMINAL DIVISION
D WIDGERY CJ, JAMES AND BRIDGE JJ
4th, 5th NOVEMBER 1971

minal law – Obscene publications – Test of obscenity – Magazine containing distinct s – Items to be considered separately – Obscenity of single item sufficient to render whole lication obscene – Obscene Publications Act 1959, s 1 (1). d

minal law – Obscene publications – Evidence – Issue of obscenity – Expert evidence – sion evidence of experts whether article tends to deprave or corrupt inadmissible – Expert ence admissible only on issue whether, although obscene, publication justified as being for ublic good – Question of obscenity exclusively for jury – Obscene Publications Act 1959, (1), 4. e

minal law – Obscene publications – Test of obscenity – Meaning of obscene – Tendency eprave and corrupt – Meaning not extending to include items which are namely 'repul-', 'filthy', 'loathsome' or 'lewd' – Aversion defence – Open to defendant to show that le so unpleasant or lewd that likely to cause people to revolt from activities described – lication having opposite effect to tendency to deprave or corrupt – Obscene Publications 1959, s 1 (1). f

minal law – Obscene publications – Indecent or obscene – Sending postal packet enclosing cent or obscene article – Meaning of obscene – Meaning including items which are shocking wd – Unnecessary to prove tendency to deprave or corrupt – Post Office Act 1953, s 11. g

Individual appellants were the editors and the appellant company the publishers magazine entitled 'Oz No 28 School Kids Issue'. They were all charged on five nts of an indictment with (1) conspiracy to corrupt public morals, in that they conspired with certain other persons to produce a magazine containing obscene matter with intent to corrupt the morals of children and young persons; (2) pub- h ng an obscene article (i e the magazine) contrary to s 2[a] of the Obscene Publica- s Act 1959; (3) enclosing an indecent or obscene article in a postal packet contrary 11[b] of the Post Office Act 1953; (4) and (5) possessing certain obscene articles copies of the magazine) for publication for gain contrary to s 2[a] of the 1959 Act.

ection 2 (1), so far as material, provides: '... any person who, whether for gain or not ublishes an obscene article or who has an obscene article for publication for gain j whether of gain to himself or gain to another) shall be liable ... (*b*) on conviction o i ndictment to a fine or to imprisonment for a term not exceeding three years or both ...'
ection 11, so far as material, provides: '(1) ... person shall not send ... a postal packet hich ... (*b*) encloses ... any indecent or obscene article ... (2) If any person acts in ontravention of the foregoing subsection, he shall be liable on ... conviction on indict- ent to imprisonment for a term not exceeding twelve months.'

The issue of the magazine in question consisted of 48 pages of diverse matter. It contained a great many serious and wholly innocuous articles dealing with such topics as school affairs and the education system as well as a number of charming and humorous illustrations. In addition there were several articles on the taking of drugs, many of which could be said to discourage the practice and to indicate its dangers. The magazine also contained, however, articles, illustrations and advertisements which had a very pronounced and overt sexual theme, relating to such matters as lesbianism, homosexuality and oral sexual intercourse from the female point of view. There was no suggestion anywhere in the magazine that these activities were wrong. At the trial the prosecution and the judge accepted the proposition that, in deciding whether the offences under the 1959 Act had been made out, the jury should look at the magazine as a whole and not at the individual items in isolation. One of the arguments (the 'aversion argument') on the charges under the 1959 Act put forward in support of the defence that the material in the magazine was not likely to deprave or corrupt within the meaning of s 1 (1)[c] of the 1959 Act was that many of the illustrations were so grossly lewd and unpleasant that they would tend to cause people to revolt from activities of the kind depicted. In support of their argument the defence adduced evidence of a highly qualified psychologist who had adopted techniques based on a similar approach for therapeutic purposes in mental hospitals and who stated that such an approach was effective in treating both sick and healthy minds. The trial lasted 27 working days, 20 of which were spent hearing expert evidence, much of which bore no relation to the defence of public good under s 4[d] of the 1959 Act, but was directed to showing that the article was not obscene, i e to showing that, in the opinion of the witness, it did not tend to deprave or corrupt. In his direction to the jury the judge read the definition of obscenity in s 1 of the 1959 Act and went on to state that something which was obscene was something which was not fit to be shown to the public and that the jury might think 'it has retained in our language and in this Act of Parliament basically that meaning ever since'. He further stated that the word '"obscene" in the dictionary sense is "repulsive", "filthy", "loathsome" or "lewd". In considering it in its legal sense in each of these five charges ... that is the approach to it which I wish you to adopt ...' Furthermore the judge did not put over to the jury the aversion argument advanced by the defence, his only reference to it being to indicate to the jury incorrectly, that in his evidence the psychologist had only been speaking of aversion as applied to the sick mind. The appellants were all acquitted on the conspiracy count, but convicted on the other counts, the jury specifically finding in relation to the charge under the 1953 Act that the posted article was both indecent and obscene. On appeal,

Held – (i) The proposition accepted by the judge that in deciding whether the offences under the 1959 Act had been made out the jury should consider the magazine as a whole and not look at individual items in isolation was entirely wrong; it was clear from s 1 of the 1959 Act that where, as in the present case, the article comprised a number of distinct items, the proper view of obscenity under that section was to apply the test to the individual items in question; if the test when so applied showed that one item was obscene that was enough to make the whole article obscene; the course adopted in the present case had, however, done no harm to the defence (see p 1158 g and j, post).

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c Section 1 (1) is set out at p 1158 d, post

d Section 4, so far as material, provides: (1) A person shall not be convicted of an offence against section two of this Act ... if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern. (2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or negative the said ground.'

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he admission of expert evidence on the issue whether or not the article was e was wrong; the question of obscenity was entirely one for the jury; expert ce was only admissible on the issue whether, if the article was found to be e, its publication was justified as being for the public good on the grounds d in s 4 of the 1959 Act; the admission of expert evidence on the obscenity the present case had, however, done the defence no harm (see 1159 a, c, d and f *R v Calder and Boyars Ltd* [1968] 3 All ER 644 applied; *Director of Public tions v A and BC Chewing Gum Ltd* [1967] 2 All ER 504 distinguished.

Nevertheless, the conviction on the counts under the 1959 Act should be quashed e there had been a serious misdirection on the law which on its face rendered y's verdict unsafe; there was a grave danger that the relevant passages from the direction to the jury had led them to believe that the word 'obscene', for the es of the 1959 Act, included in its meaning 'repulsive', 'filthy', 'loathsome' or ; furthermore the judge's direction had not properly put to the jury the e's aversion argument; those two matters together formed a very substantial rious misdirection (see p 1160 d and j, p 1161 h and p 1162 b, post).

The conviction under s 11 of the 1953 Act would, however, be upheld; in ction the word 'obscene' in its context as an alternative to 'indecent' had inary meaning which included things which were shocking or lewd; since fence was constituted if the relevant material was 'indecent or obscene' and, wer to a specific question, the jury had stated that the magazine was both, were no grounds on which it could be maintained that the jury had been ection in relation to that charge (see p 1158 c and p 1162 c and d, post).

t of obscenity, see 10 Halsbury's Laws (3rd Edn) 667, para 1275, and for cases subject, see 15 Digest (Repl) 895, 8625-8631.

the Post Office Act 1953, s 11, see 25 Halsbury's Statutes (3rd Edn) 418.

the Obscene Publications Act 1959, ss 1, 2 and 4, see 8 Halsbury's Statutes dn) 479, 480, 485.

referred to in judgment

r of Public Prosecutions v A and BC Chewing Gum Ltd [1967] 2 All ER 504, [1968] 159, [1967] 3 WLR 493, 131 JP 373, Digest (Cont Vol C) 250, 8654*ba*.

lder and Boyars Ltd [1968] 3 All ER 644, [1969] 1 QB 151, [1968] 3 WLR 974, 133 , 52 Cr App Rep 706, Digest (Cont Vol C) 249, 8631*ba*.

and authority also cited

Publications Ltd v Watson [1952] 1 All ER 1256.

klin (1868) LR 3 QB 360.

ertin Secker Warburg Ltd [1954] 2 All ER 683, [1954] 1 WLR 1138.

ugain Books Ltd [1961] Crim LR 176

ald's Criminal Pleading, Evidence and Practice (37th Edn) paras 3838, 3840, , 3844.

le

nd June 1971 at the Central Criminal Court (Judge Argyle) the appellants, Anderson, Richard Clive Neville and Felix Dennis, as editors, and Oz Publica- nk Ltd, as publishers, were all charged on five counts of an indictment as : (1) conspiracy to corrupt public morals in that they conspired together with Berger and other young persons to produce a magazine, 'Oz No 28 School sue', with intent thereby to 'debauch and corrupt the morals of children and persons'; (2) publishing an obscene article, i e the magazine, contrary to s 2 of scene Publications Act 1959; (3) sending indecent or obscene articles by post con- s 11 of the Post Office Act 1953; (4) having obscene articles for publication for

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gain, i e 252 copies of the magazine, contrary to s 2 of the 1959 Act, and (5) having obscene articles for publication for gain, i e 220 copies of the magazine, contrary to s of the 1959 Act. The jury acquitted the appellants on count 1, but convicted them (by majority of 10 to 1) on the remaining four counts. On 5th August 1971 the appellants Anderson, Neville and Dennis were sentenced to concurrent terms of imprisonment as follows: the appellant Anderson, 12 months on count 2, six months on count 3, 12 months on count 4 and 12 months on count 5; the appellant, Neville, 15 months on count 2, six months on count 3, 15 months on count 4 and 15 months on count 5. The appellant Dennis to nine months on count 2, six months on count 3, nine months each on counts 4 and 5. The appellant company was sentenced to fines of £100 each on counts 2, 4 and 5 and £100 on count 3, and it was also ordered to pay a quarter of the costs of the prosecution to an amount not exceeding £1,250. The appellant Neville, being Australian born, was recommended for deportation. The appellants appealed against both their convictions and sentences. The main grounds of appeal were that the trial judge had, on counts 2, 4 and 5, misdirected the jury as to the meaning of 'obscenity' under the Obscene Publications Act 1959 in that he did not make it clear to the jury that for the purposes of that Act 'obscene' meant only a tendency to deprave or corrupt, and that he did not put to the jury the defence that the illustrations in the magazine were so grossly lewd and unpleasant that they had an aversive effect and, far from tempting those who had not experienced the acts to take part in them, they would put off those who might be tempted so to conduct themselves. All the appellants appealed against their sentences on the grounds that the terms of imprisonment and fines imposed respectively were excessive. The appellant Neville also appealed against the recommendation of deportation. The facts are set out in the judgment of the court.

J C Mortimer QC and *J J Walker-Smith* for the appellants.
B L Leary and *R D Amlot* for the Crown.

LORD WIDGERY CJ delivered the judgment of the court. These three individual appellants (as they now are) and the appellant company, Oz Publications Ink Ltd, were convicted at the Central Criminal Court at the end of July 1971 after a lengthy trial occupying no less than 27 working days. The indictment contained five counts. In the first the four appellants were charged with conspiracy to corrupt public morals, the particulars being that—

> 'on divers days between the 1st day of January and the 8th day of June 1970 [I only quote the relevant words] they conspired together with Vivien Laurence Berger and with certain other young persons to produce a magazine containing divers obscene, lewd, indecent and sexually perverted articles, cartoons, drawings and illustrations with intent thereby to debauch and corrupt the morals of children and young persons within the Realm.'

On that count all four appellants were acquitted. It is quite obvious from the verdicts of the jury on the other counts that they were acquitted because the jury were not satisfied that there was the charged intent to corrupt public morals. Of the remaining counts, count 2 was laid under s 2 of the Obscene Publications Act 1959 and charged the four appellants that—

> 'on a day between the 1st day of May and the 8th day of June 1970 . . . they published an obscene article namely a magazine entitled "OZ No. 28 School Kids Issue".'

And indeed it is the publication known as Oz No 28 School Kids Issue which is the central theme of the proceedings with which we are now concerned. On that count they were all convicted. The appellant Neville was sentenced to 15 months' imprisonment, the appellant Anderson to 12, the appellant Dennis to nine and the appellant company was fined £300. Then on count 3 it was charged under the Post Office A

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, that all four of them on a day there specified 'sent a postal packet which en- a
ed a number of indecent or obscene articles namely magazines entitled "OZ No.
chool Kids Issue".' That count has been referred to as 'the Post Office Act count'.
nt 4, again against all four appellants, alleged that they had certain obscene arti-
in their possession for publication for gain. The articles were copies of the same
azine to which I have referred. On that count all were convicted. The same
ous sentences were imposed, to be concurrent, and again the appellant company
fined £300. The fifth count was similar to the fourth. It again was laid under s 2 b
the Obscene Publications Act 1959, and it again alleged that they had certain
ene articles in their possession for publication for gain, the articles again being
No 28. They appeal today, by leave of the court, against conviction and sentence.
This is a case which has aroused enormous interest amongst the public and no doubt
decision of the court today will also excite a certain amount of interest and com-
nt. It is therefore perhaps worthwhile briefly to remind oneself of the functions c
judge, jury and of this court, in cases of this kind. At the Central Criminal Court
only issue, up to the moment of conviction, was whether that jury as then con-
uted would find this publication obscene within the meaning of the various
ions. Whatever the decision of the jury in the court below, it could have no bind-
effect on other juries on other occasions in relation to other publications, and the
ception, somewhat widely held, that this case was a great milestone in that respect, d
a false understanding. It was not a case which would in itself create an authority
the future at all. The function of this court is also worth explaining. It is not here
consider whether the jury was right or wrong, nor to consider whether the pub-
ion was obscene or not obscene—that is a decision for the jury and the jury only.
e function of this court is to review the proceedings below with the assistance of
sel to see if the proceedings were properly conducted, and if not to see whether e
y irregularities which arose in the course of the proceedings were sufficient to
der the finding of the jury unsafe or unsatisfactory.
I stress that because it is important for people to realise that we in this court are not
e to clear Oz or to condemn Oz. Our own opinion in regard to the character of
e subject-matter is totally unimportant. We are here simply to review what hap- f
ned below and see whether there were such irregularities as to justify the convictions
ing quashed. If we come to the conclusion that there were such irregularities, then
e quash the convictions and since there is no machinery in English law for re-trial
such circumstances, the matter rests in that somewhat inconclusive state.
Now to turn to Oz itself, it is, as its title proclaims, the 28th edition in the series.
's a magazine of some 48 pages. It is printed in bright and attractive colours, and it g
ntains what one might fairly describe as a very considerable assortment of items.
one can pass a judgment on Oz without reading it; nobody can successfully do
hat I am now going to attempt to do, namely to give some idea to those who have
t read it, of what it contains, but it is important, as I say, in view of the public
erest in this case, that people should have some idea of what the magazine really
ntains.
There are in it a number of perfectly serious articles. Its origin is not without h
erest. The editors apparently on this occasion decided to recruit the assistance of a
mber of children of school age to assist them in compiling the magazine. It may
e that originally the idea was that the children should do it all, but it is evident
om the evidence that they did not do it all and that some contributions at any rate
the magazine came from the editors themselves, the three appellants. The idea, j
we are told, and the reason for doing it this way, was to enable children of school
e to express their view and to see the sort of magazine which they would make,
nd so it came out and is called the School Kids issue. There was a suggestion
low that it was intended for consumption only by 'school kids' but that, as far as
e can see, was not made out, and the intention no doubt was that it would enjoy
normal circulation of some 10 000 or 40 000 copies

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a As I have said, it includes a great many serious and wholly innocuous articles. It deals with school affairs, the system of education in this country, the system of corporal punishment in schools and a whole host of topics of that sort. It has a number of articles concerned with the taking of drugs, and it is perfectly fair to say, as has been said, that in form at any rate many of these articles discouraged the taking of drugs and indicate the danger of taking drugs. On the other hand, and according to the point of view which one adopts, some of the articles are said to have the reverse b effect and to encourage the taking of drugs. That kind of distinction was the distinction which the jury in the court below had to direct their minds to, and it is not for us to comment on it further.

In addition to these articles, there are a great many illustrations, some of them charming and humorous, which would not cause the slightest flutter in any well conducted Victorian household. Others, however, are quite different. There is a c good deal of material which one gathers is culled from what are called American comics and there are many illustrations which have a very pronounced and overt sexual theme. I do not want to be unfair to the publication by stressing unduly those items in it which attracted the principal attention in this case, but again one cannot give a fair appreciation of what the magazine looks like without looking at some of d the less attractive features. On p 28 there is an advertisement for what seems to be a magazine, a magazine called Suck. It is an advertisement occupying some 30 or 40 lines of print. It is a salaciously written account of the joys from the female aspect of an act of oral sexual intercourse. It deals with the matter in great detail. It emphasises the pleasures which the writer says are to be found in this activity, and there is in it no suggestion anywhere which would imply that this was a wrong thing to do e or in any way induce people not to do it. The importance of that last observation is that there could be nothing here as far as we could see on which an argument that this was aversive, as tending to induce people *not* to conduct the activity described, could be founded. There are a great many pictures of people in, or apparently in, the act of sexual intercourse. Some of them are extremely artistic; some of them are crude to a degree. There is a comic strip in the middle of the magazine, again no f doubt from American sources, which shows a number of children dressed in school clothes indulging in a number of sexual activities including at the end a very crude drawing of a girl in the act of oral sexual intercourse. Shocking, undoubtedly; whether it was obscene was of course, as I have endeavoured to explain, a matter for the jury.

Then we have the back cover itself, which shows some five nude women. It is g extremely attractively drawn, and at first inspection, as one of the witnesses said, it appears to be a simple piece of artistic work. Closer inspection however shows that these women are lesbians or at least are indulging in lesbian activities. One of them has what appears to be a rat's tail protruding from her vagina. In another case a woman is wearing strapped to her thighs an artificial penis or dildo, as apparently it is called, and other pairs are indulging in what are clearly lesbian activities. Attention h has not unnaturally been drawn to that as an example of material in this magazine which might deprave or corrupt.

Then—and I am not going to try and review the magazine as a whole—in addition to that, there is a page of what have been called small advertisements, apparently genuine advertisements and not advertisements concocted for the purpose of the magazine, in which various people advertise for co-operation in sexual activities of a j somewhat devious kind. For example, one advertisement is headed:

> "Voyeurs . . . Homosexuals, Lesbians, Heterosexuals, All Erotic Minorities . . . Join Contact Club International [and then an address is given]. Membership £2 only. 100% Confidential. Free Fucking, Sucking, Hardcore Pornos

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one example of advertisements which are advertised here. Another says: a
e male models wanted'; another says: 'Guy requires turned on chick for tem-
narriage', and so it goes on. There is a page of advertisements there which on
r certainly could be regarded as tending to corrupt or deprave as tending to
nd propagate these kinds of activity.
e trial, which as I have said lasted some 27 days, these five counts were before
, and it is important to note at the outset that although the word 'obscene' b
in each of the counts its meaning in its context is not necessarily the same in
rance, and it is this difference in meaning which has given rise to the diffi-
which we have had to investigate in this court. So far as the Post Office Act
concerned, there is no doubt in our judgment but that 'obscene' in its context
ernative to indecent has its ordinary or as it is sometimes called dictionary
g. It includes things which are shocking, lewd, indecent and so on. On the c
nd, in the Obscene Publications Act 1959, there is a specific test of obscenity
harges under that Act it is this test and this test alone which is to be applied,
in this form. Section 1 of the Act provides:

1) For the purposes of this Act an article shall be deemed to be obscene if its
cts or (where the article comprises two or more distinct items) the effect of
one of its items is, if taken as a whole, such as to tend to deprave and corrupt d
ons who are likely, having regard to all relevant circumstances, to read, see
ear the matter contained or embodied in it.
2) In this Act "article" means any description of article containing or embody-
matter to be read or looked at or both, any sound record, and any film or
r record of a picture or pictures.'

e observed that in the first subsection of that section, the test of obscenity for e
purposes is a tendency to deprave and corrupt and nothing else will do, so
arges under the 1959 Act are concerned.
e trial, the Crown accepted the proposition that in deciding whether the
under the 1959 Act had been made out, it was right for the jury to consider
gazine as a whole and not to look at individual items in isolation. That was a f
ion accepted by the Crown, we are told by counsel for the Crown, largely in
to the defence, and, being accepted by both parties, it was a proposition which
epted by the judge as well. It certainly did the defence no harm; it was
o their interests; but in the judgment of this court it was entirely wrong.
ur view quite clear from s 1 that where one has an article such as this com-
number of distinct items, the proper view of obscenity under s 1 is to apply
to the individual items in question. It is equally clear that if, when so applied, g
shows one item to be obscene that is enough to make the whole article
Now that may seem unfair at first reading, but it is the law in our judgment
any question. A novelist who writes a complete novel and who cannot cut
icular passages without destroying the theme of the novel, is entitled to have
judged as a whole, but a magazine publisher who has a far wider discretion h
at he will, and will not, insert by way of items is to be judged under the 1959
what we call the 'item by item' basis. This was not done in this case. Our
ncern in mentioning the point now is to ensure that it will be done in future.
ider the article as a whole did no harm to the defence in the present case.
proper course to be taken in future is the item by item approach for
es and other articles comprising a number of distinct items.
econd matter which arose in the court below, and which requires some general j
nts by this court, relates to the expert evidence which was called. The defence
xpert evidence for something more than 20 days. A great mass of expert
e was called. Part of that evidence was directed to what is called the 'public
efence contained in s 4 of the 1959 Act. I need not read the section in full but
t section a defence can be put forward in respect of an obscene article that

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its publication is desirable in the public good, and the section specifically provides that the opinion of experts as to the literary, artistic, scientific or other merit of such an article may be admitted. What is contemplated there is that if an article is found to be obscene, evidence of experts as to its merits under those heads may be called and it is then for the jury to balance the merit and demerit of the article and conclude whether they find it acceptable or not. So far as evidence was called under that section, no question arises on it now, but a majority of the expert evidence called by the defence in this case bore no relation to the defence of public good under s 4, but was rather directed to showing that the article was not obscene. In other words, it was directed to showing that in the opinion of the witness it would not tend to deprave or corrupt. Now whether the article is obscene or not is a question exclusively in the hands of the jury, and it was decided in this court in *R v Calder and Boyars Ltd*[1] that expert evidence should not be admitted on the issue of obscene or no. It is perfectly true that there was an earlier Divisional Court case in which a somewhat different view had been taken. It was the case of *Director of Public Prosecutions v A and BC Chewing Gum Ltd*[2]. That case in our judgment should be regarded as highly exceptional and confined to its own circumstances, namely a case where the alleged obscene matter was directed at very young children, and was itself of a somewhat unusual kind. In the ordinary run of the mill cases in the future the issue 'obscene or no' must be tried by the jury without the assistance of expert evidence on that issue, and we draw attention to the failure to observe that rule in this case in order that that failure may not occur again. We are not oblivious of the fact that some people, perhaps many people, will think a jury, unassisted by experts, a very unsatisfactory tribunal to decide such a matter. Those who feel like that must campaign elsewhere for a change of the law. We can only deal with the law as it stands, and that is how it stands on this point.

I should add, as some justification for the course which was taken below, that it may be that the calling of expert evidence was related to the first count of conspiracy on which the jury acquitted. We are not convinced that that was so, but we need not pursue it further. In ordinary cases under s 2 of the 1959 Act expert evidence on the issue obscene or not is not to be admitted. Now here it was admitted and again it did the defence no harm. They called the evidence and, insofar as there was any irregularity there, it was favourable to the defence and not to the prosecution.

I turn now to the criticisms which have been made by counsel for the appellants of the directions given by the learned judge in this case. The first two, which to a very large extent are complementary, are really the ones on which this appeal against conviction is based. It is said that in directing the jury as to the meaning of 'obscenity' under the 1959 Act, the learned judge did not make it clear that for the purpose of that Act 'obscene' means, and means only, a tendency to deprave or corrupt. He dealt with the meaning of obscenity in more than one place, and it is to be remembered that in the context of this case he had to deal with the meaning of 'obscenity' for the purposes of the different charges. Dealing with the charges under the 1959 Act he said:

> 'So you see in s 1 it starts off with the definition or the test for obscenity, which is the law of this country at the present time. " . . . an article"—well, this Oz 28 is an article—"shall be deemed to be obscene if its effect . . . is, if taken as a whole, such as to tend to deprave or corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." [If I may interpolate, so far so good. He then goes on:] Now, that is the test of obscenity. I must give you a little more help about the meaning of that—the legal meaning of it. We were told, I think, by Mr. Dunne one of the last witnesses in this trial, that the historical meaning of the word

1 [1963] 3 All ER 644, [1969] 1 QB 151
2 [1967] 2 All ER 504, [1968] 1 QB 159

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"obscene"—and it is of interest and importance in this case—comes originally from the Greek and it refers to things which are not fit, or not right, to be shown on the stage at a public performance. Something which is obscene—"ob" means "off" or "outside of"—is something which is not fit to be shown to the public. You may think it has retained in our language and in this Act of Parliament basically that meaning ever since.'

Counsel for the appellants says, and says with some force, that we here have the judge already beginning to widen the true statutory definition of the word 'obscene'. It does not finish there because later on the learned judge returned to the question of the meaning of the word 'obscene'. He said:

'It is for you as a jury, so the law says, to decide whether taken as a whole, this is likely to deprave or corrupt a significant proportion of people who are likely to read it. As I shall mention later on, this may not, in fact, be so difficult or formidable a task for you as might first appear. The word "obscene" in the dictionary sense is "repulsive", "filthy", "loathsome" or "lewd". In considering it in its legal sense in each of these five charges—because it is mentioned in each one—that is the approach to it which I wish you to adopt, please, as I have been explaining to you during the last few minutes.'

We have had a good deal of argument in this court about exactly what those words mean and exactly how the jury would have reacted to them, but we feel bound to accede to counsel for the appellants' argument that at least there is grave danger that the jury from that passage in the direction to them, took the view or might have taken the view, that 'obscene' for all purposes including the purposes of the 1959 Act included 'repulsive', 'filthy', 'loathsome' or 'lewd'.

The matter does not stop there because the defence in this case on the charges under the 1959 Act was in a sense two-pronged. They said this material in Oz No 28 was not likely to deprave or corrupt; that it may shock is accepted, but it is not likely to cause people to act in a depraved or corrupted fashion. One of the arguments advanced in support of that line of defence was that many of the illustrations in Oz were so grossly lewd and unpleasant that they would shock in the first instance and then would tend to repel. In other words, it was said that they had an aversive effect and that far from tempting those who had not experienced the acts to take part in them they would put off those who might be tempted so to conduct themselves. The argument which counsel for the appellants put forward on this point is that the learned trial judge never really got over to the jury this argument of aversion, in other words, never put over to the jury that the proposition central to the defence case was that certain illustrations could be so disgusting and filthy that they would not corrupt and deprave but rather would tend to cause people to revolt from activity of that kind. Strangely enough the same situation arose in the earlier decision in this court to which I referred a few moments ago. *R v Calder and Boyars Ltd*[1] was in fact a then well publicised criminal trial dealing with the book 'Last Exit to Brooklyn'. Counsel for the appellants appeared for the defence, and in this court counsel argued, and this court held rightly argued, that the failure of the learned judge to put what one might call the aversion argument was fatal to the retention of the conviction.

Those two matters put together, in our judgment form a very substantial and serious misdirection, and they are not made any better by the fact that on the one occasion when the judge dealt with the aversion argument in any serious way at all he dealt with it in such a way as to destroy, rather than to explain, its value. It arose in this way. There was a doctor called Dr Heywood, who was the first and perhaps one of the most significant experts called for the defence. He was a highly qualified psychologist. In the course of his work he attended a number of hospitals and was in

[1] [1969] 3 All ER 644, [1969] 1 QB 151

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constant contact with people suffering from various degrees of mental disability. He gave evidence about his experience of this aversion theory. He said in terms on more than one occasion that it was a form of therapy actively practised in mental hospitals but he did go on to say without any doubt at all that in his judgment it was effective not only for the mind of the sick but also for the healthy mind as well. Unfortunately when the judge came to deal with Dr Heywood's evidence he told the jury on more than one occasion that Dr Heywood was only speaking of aversion as applied to the sick mind, whereas in fact, as I have pointed out, the evidence of the doctor went far beyond that and was in fact, if accepted by the jury, evidence of the effect of aversion techniques on the sick mind and the healthy alike.

In addition to those criticisms of the learned judge's attitude to the law, counsel for the appellants has also developed before us a large number of criticisms of the judge's misdirections, as he would put it, on the facts and the evidence. It is not possible to deal in detail with all his objections. The best that the court can do is to give a general impression of them at the end of the day when the argument has been fully deployed. In many instances, the treatment of the evidence of experts was very abbreviated. On many occasions the space attributed to a particular expert in the summing-up is perhaps surprisingly small but it must be remembered that this was an extremely difficult case for the judge to sum up. To deal with the evidence of experts extending over 20 or 25 days from his notebook is a task which no one would envy and it was inevitable in many respects that the reference should be brief. However, there are in a number of cases sentences, asides almost, in the course of the summing-up which tend to denigrate the witness in question. It may be in some instances these asides were justified—it is hard for us to check them all in detail—but they are frequent and give the impression that the judge was biased against experts as a group and was inclined to make little of their evidence whenever he got the chance to do so. In some instances counsel for the appellants' criticisms seem to us at the end of the day not to be justified. He made much of the fact that the judge had spoken of 'these so-called experts' on more than one occasion, but we think having read the summing-up as a whole that the references to 'these so-called experts' were not intended to be a derogatory reference to the highly qualified men who were included amongst the experts but rather was intended to refer to some others who came later in the trial and who might legitimately have justified the title 'so-called experts'.

On the whole, we find comparatively little weight in the criticisms of factual misdirections. There were said originally to be 52, or was it 65, of them. Many of them are errors of such a trivial character that they really deserve no attention at all. Those which we are concerned about are the misdirections amounting to an apparently unfair treatment of an expert witness, but even so when one adds them all together it does not in our judgment amount to a great deal and certainly we should hesitate a long time before setting these convictions aside if that were the only ground urged in favour of it.

In fact at the end of the day we have come to the conclusion that the misdirection on the law, by which I of course mean misdirection in regard to the definition of 'obscenity' and the aversion theory, is a serious misdirection, and one which on its face rendered the verdict of the jury unsafe. We have considered with the assistance of counsel whether this is a case for applying the proviso to s 2 of the Criminal Appeal Act 1968 and saying that the convictions should be upheld on the grounds that no actual miscarriage of justice occurred. The argument in favour of our so acting is that if one looks at this magazine item by item as we have already indicated it should have been looked at, then it is said that certain items, perhaps especially the advertisement for Suck, are such that they are per se obscene and that no one could possibly (looking at them in isolation) take any other view. It may well be that that is true. It may well be that if the matter had been put to the jury in that way on a proper direction they would have taken the view that the advertisement for Suck

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was obscene and, if they had, the result would have been that the whole magazine would have been treated as obscene. But having regard to the fact that the trial below was conducted on a wholly different basis, we do not think, although we have considered the matter with care, that it would be right here to apply the proviso on the basis that the items treated individually would necessarily have resulted in a conviction in respect of the magazine as a whole. In the result, therefore, so far as the 1959 Act counts, i e counts 2, 4 and 5, are concerned, the appeal is allowed and the convictions are quashed. Count 1 has gone anyway by reason of the verdict of the jury.

We are left only with the Post Office Act count, count 3. I have said really nothing about that so far. The essence of the offence there is sending through the post obscene or indecent matter. 'Obscene' here may have its ordinary meaning and therefore we are not troubled on this count with any difficulties about the jury having been wrongly directed as to the meaning of the word. It is not without importance to remember that when the jury returned their verdict on count 3 they were specifically asked whether they found the matter to be indecent or obscene or both, and they said both. So it is evident that they treated this as a case in which Oz on that definition was an obscene publication. There is on the face of it an appeal against this conviction as well, but counsel has had very little to urge on behalf of the appellants on this count, and indeed we can see no reason whatever which would justify the view that there is here any kind of material misdirection which would justify the quashing of the conviction. Accordingly, the conviction on count 3 must stand and the appeal is dismissed so far as it relates to count 3.

That means that all we are concerned with in the end is the proper sentence in the revised situation which now prevails. The penalty imposed by the learned trial judge for count 3 was six months in the case of each of the individual appellants, and a fine of £100 for the appellant company. Counsel for the appellants has drawn our attention to the fact, which is undoubtedly true, that prison sentences for offences of obscenity have been very rare in the past. What the reason for this is is something on which we do not wish to speculate, but it is true that to send a man to prison for offences in this classification has been a relatively unusual thing in the past. However, those of us who sit regularly in this court are only too familiar with the fact that when a particular offence becomes prevalent, and a wave of it appears, the only course which can be taken is to increase the sentences in order to adjust for the increase in the incidence of the offence. That is one of our responsibilities which we must exercise to the best of our ability. We would therefore like to make it quite clear in general terms that any idea that an offence under the Obscene Publications Act 1959 does not merit a prison sentence should be eradicated. There will be many cases in future in which a prison sentence is appropriate if the court imposing the sentence thinks fit, and any general impression to the contrary should not be retained. In this case having regard to the jury's verdict and having regard to all the other considerations to which I have referred, we are of the opinion that the sentence on count 3 must stand, but of course it will in fact be suspended because any sentence of this length is under the present law automatically a suspended sentence.

Accordingly, the result of the appeal on conviction will be that the conviction on count 3 is sustained. The sentences are retained but suspended for two years. The deportation recommendation, which I have omitted to mention, in respect of the appellant Neville will be cancelled, it being inappropriate to the offence of which he is eventually found guilty.

Appeals allowed in part. Convictions on counts 2, 4 and 5 quashed. Sentences on count 3 suspended for two years. Deportation order in respect of the appellant Neville set aside. Order for costs against the appellant company reduced to £50.

Solicitors: *Offenbach & Co* (for the appellants); *Director of Public Prosecutions* (for the Crown).

N P Metcalfe Esq Barrister.

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Appendix B

San Diego Union News Article
Dated April 3, 1973 67

Costa Mesa Daily Pilot
News Article Dated March 26, 1973 68

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San Diego, Calif.
Union
(Cir. D 269,813)

APR 3 1973

Allen's P. C. B. Est. 1888

School Suspends Paper Distributors

1661

San Diego Union Staff Dispatch

LAKESIDE — Two students have been suspended for distributing on the El Capitan High School campus an underground newspaper which has raised the eybrows of parents and administrators this year.

Principal William Davis said the publication, called Two Week Leak, uses obscene language and occasionally advocates law breaking, by such stories as telling how to make telephone calls without paying.

Parents at recent community conferences discussed the publication at length "and the general consensus is that the people are not happy with it," said Davis.

AROUND FOR YEARS

"There's been one of these newspapers for many years at our school that's been published intermittently. It's being published and distributed off-campus.

"We have two of them now, the most recent being one that takes directly the opposite view. It's a Christian-oriented view," Davis said.

The principal said he has suspended two students for distributing the underground newspaper on campus. One suspension is currently in force. He would not name the students involved.

POLICY EXISTS

"We have a district policy for distribution of materials on campus that follows the state guidelines on obscenity." He said the newspaper is distributed off-campus "down on the corner in front of the school."

"There is a small group of young people that feel this is their medium of communication. Some of it isn't bad at all. Some is quite objectionable to us," Davis said.

"We respect their right to do that, as long as they publish it off-campus. It's not within our province to tell them what to write. At the early part of this school year we had the newspaper submitted to us and we indicated to them the problems.

DIDN'T CHANGE IT

"They didn't want to change it. It's the same kind of material you find in the Free Press. Much of it is copied from those type of publications. Primarily the language is obscene." Davis said he has not seen any obscene pictures in the newspaper.

"We're caught in the middle. We're trying to be fair with the kids that operate it, and assure that they know their capability to publish off-campus.

"But we have to be very careful. If they do violate the district policy, we have to take action," he said.

Costa Mesa, Calif.
Daily Pilot
(Cir. D)

MAR 26 1973

Allen's P.C.B. Est. 1909

Newport Ban On Sex Papers Legally Shaky

By L. PETER KRUEG
Of the Daily Pilot Staff

Newport Beach City Attorney Dennis O'Neil today conceded that a city imposed ban on newsracks sales of two Los Angeles sex-oriented periodicals would be on shaky legal grounds.

"The legality of the city's actions might take judicial determination," O'Neil said.

"If the city decides to ban newsrack sales without a court order to determine they are obscene, it might not stand up," he said.

O'Neil is scheduled to meet with Police Chief B. James Glavas and City Manager Robert L. Wynn Tuesday to determine if Newport Beach will forbid the street sales of the Los Angeles Star and the Hollywood Press in an attempt to keep them out of the hands of minors.

"It's a value judgment thing the police department can make as 'experts' in that field," O'Neil said.

The Tuesday meeting is intended to determine if the city will issue a business license to Jose Ortega of Huntington Beach, distributor of the two off-beat publications.

"If we issue the permit with the condition that they not be sold on the street because they are harmful to minors, we'll just have to see what happens," O'Neil said.

Glavas, calling the newspapers "filth" gave every indication he intends to keep them out of newsracks.

"We have an obligation to protect the minds of minors," Glavas said. "To make this stuff readily accessible to persons under 18 is simply not doing the job society is supposed to do.

"We're going to restrict the sale from racks," he said. "We intend to offer the applicant the opportunity to obtain a license to distribute the publications in grocery stores and liquor stores where there is an adult in charge of the sale and can control the sale to adults."

Referring specifically to the Los Angeles Star, which has also been banned by the district attorney in unincorporated Orange County territory, Glavas said:

"It's got a lot of filth in it. It's absolute pornography. The only thing is that it somehow complies with the ridiculous ruling of the U.S. Supreme Court that says obscene material must be completely without redeeming social importance.

"It's got nine columns of absolute pornography and then one column on the clapper rail birds in Upper Newport Bay. That's the kind of paper it is."

Glavas' opinion of the publication echoed that of City Manager Wynn who earlier had labeled them "trash."

Attorneys for Ortega still could not be reached for comment on the apparent pending ban by the city. The proposed ban would be similar to the action taken by Huntington Beach councilmen earlier this month when they outlawed the street sales of the Los Angeles Free Press in their city. The Free Press is widely distributed on the streets of Newport Beach, however.

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regularly." *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 84 (1936) (concurring opinion). Cf. *Fahey v. United States*, 321 U. S. 414 (1944); *Crowell v. Benson*, 285 U. S. 22 (1932).

That opportunity was denied in this case, and important benefits were directly taken from appellants without affording them a chance to contest the legality of the taking in a court of law. Cf. *Fuentes v. Shevin*, 407 U. S. 67 (1972).

The extent to which the State may entrust to administrative agencies the unreviewable authority to restrict pre-existing rights is one of the great questions of constitutional law about which courts and commentators have debated for generations. See generally Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953); 4 K. Davis, Administrative Law Treatise § 28.18 (1958). Because I am not ready to decide that question summarily, *sub silentio*, and without the benefit of full briefing and oral argument, I must dissent from the Court's decision.

Per Curiam

PAPISH *v.* BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 72-794. Decided March 19, 1973

Expulsion of student for distributing on campus a publication assertedly containing "indecent speech" proscribed by a bylaw of a state university's Board of Curators *held* an impermissible violation of her First Amendment free speech rights since the mere dissemination of ideas on a state university campus cannot be proscribed in the name of "conventions of decency."

Certiorari granted; 464 F. 2d 136, reversed.

PER CURIAM.

Petitioner, a graduate student in the University of Missouri School of Journalism, was expelled for distributing on campus a newspaper "containing forms of indecent speech" [1] in violation of a bylaw of the Board of Curators. The newspaper, the Free Press Underground, had been sold on this state university campus for more than four years pursuant to an authorization obtained from the University Business Office. The particular newspaper issue in question was found to be unacceptable for two reasons. First, on the front cover the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read: ". . . With Liberty and Justice for All." Secondly, the issue contained an article entitled "M-----f----- Acquitted," which discussed the trial and acquittal on an assault

[1] This charge was contained in a letter from the University's Dean of Students, which is reprinted in the Court of Appeals' opinion. 464 F. 2d 136, 139 (CA8 1972).

charge of a New York City youth who was a member of an organization known as "Up Against the Wall, M-----f-----."

Following a hearing, the Student Conduct Committee found that petitioner had violated Par. B of Art. V of the General Standards of Student Conduct which requires students "to observe generally accepted standards of conduct" and specifically prohibits "indecent conduct or speech."[2] Her expulsion, after affirmance first by the Chancellor of the University and then by its Board of Curators, was made effective in the middle of the spring semester. Although she was then permitted to remain on campus until the end of the semester, she was not given credit for the one course in which she made a passing grade.[3]

After exhausting her administrative review alternatives within the University, petitioner brought an action

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[2] In pertinent part, the bylaw states:

"Students enrolling in the University assume an obligation and are expected by the University to conduct themselves in a manner compatible with the University's functions and missions as an educational institution. For that purpose students are required to observe generally accepted standards of conduct. . . . [I]ndecent conduct or speech . . . are examples of conduct which would contravene this standard. . . ." 464 F. 2d, at 138.

[3] Miss Papish, a 32-year-old graduate student, was admitted to the graduate school of the University in September 1963. Five and one-half years later, when the episode under consideration occurred, she was still pursuing her graduate degree. She was on "academic probation" because of "prolonged submarginal academic progress," and since November 1, 1967, she also had been on disciplinary probation for disseminating Students for a Democratic Society literature found at a university hearing to have contained "pornographic, indecent and obscene words." This dissemination had occurred at a time when the University was host to high school seniors and their parents. 464 F. 2d, at 139 nn. 3 and 4. But disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights.

for declaratory and injunctive relief pursuant to 42 U. S. C. § 1983 in the United States District Court for the Western District of Missouri. She claimed that her expulsion was improperly premised on activities protected by the First Amendment. The District Court denied relief, 331 F. Supp. 1321, and the Court of Appeals affirmed, one judge dissenting. 464 F. 2d 136. Rehearing *en banc* was denied by an equally divided vote of all the judges in the Eighth Circuit.

The District Court's opinion rests, in part,[4] on the conclusion that the banned issue of the newspaper was obscene. The Court of Appeals found it unnecessary to decide that question. Instead, assuming that the newspaper was not obscene and that its distribution in the community at large would be protected by the First Amendment, the court held that on a university campus "freedom of expression" could properly be "subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures." *Id.*, at 145. The court concluded that "[t]he Constitution does not compel the University . . . [to allow] such publications as the one in litigation to be publicly sold or distributed on its open campus." *Ibid.*

This case was decided several days before we handed down *Healy* v. *James*, 408 U. S. 169 (1972), in which, while recognizing a state university's undoubted preroga-

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[4] Prefatorily, the District Court held that petitioner, who was a nonresident of Missouri, was powerless to complain of her dismissal because she enjoyed no "federally protected or other right to attend a state university of a state of which she is not a domiciled resident." 331 F. Supp. 1321, 1326. The Court of Appeals, because it affirmed on a different ground, deemed it "unnecessary to comment" upon this rationale. 464 F. 2d, at 141 n. 9. The District Court's reasoning is directly inconsistent with a long line of controlling decisions of this Court. See *Perry* v. *Sindermann*, 408 U. S. 593, 596–598 (1972), and the cases cited therein.

tive to enforce reasonable rules governing student conduct, we reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." *Id.*, at 180. See *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503 (1969). We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of "conventions of decency." Other recent precedents of this Court make it equally clear that neither the political cartoon nor the headline story involved in this case can be labeled as constitutionally obscene or otherwise unprotected. *E. g.*, *Kois* v. *Wisconsin*, 408 U. S. 229 (1972); *Gooding* v. *Wilson*, 405 U. S. 518 (1972); *Cohen* v. *California*, 403 U. S. 15 (1971).[5] There is language in the opinions below which suggests that the University's action here could be viewed as an exercise of its legitimate authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination. While we have repeatedly approved such regulatory authority, *e. g.*, *Healy* v. *James*, 408 U. S., at 192–193, the facts set forth in the opinions below show clearly that petitioner was expelled because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution.[6]

[5] Under the authority of *Gooding* and *Cohen*, we have reversed or vacated and remanded a number of cases involving the same expletive used in this newspaper headline. *Cason* v. *City of Columbus*, 409 U. S. 1053 (1972); *Rosenfeld* v. *New Jersey*, 408 U. S. 901 (1972); *Lewis* v. *City of New Orleans*, 408 U. S. 913 (1972); *Brown* v. *Oklahoma*, 408 U. S. 914 (1972). Cf. *Keefe* v. *Geanakos*, 418 F. 2d 359, 361 and n. 7 (CA1 1969).

[6] It is true, as MR. JUSTICE REHNQUIST's dissent indicates, that the District Court emphasized that the newspaper was distributed near the University's memorial tower and concluded that petitioner was engaged in "pandering." The opinion makes clear, however, that the reference to "pandering" was addressed to the content of the news-

Since the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech, and because the state University's action here cannot be justified as a nondiscriminatory application of reasonable rules governing conduct, the judgments of the courts below must be reversed. Accordingly the petition for a writ of certiorari is granted, the case is remanded to the District Court, and that court is instructed to order the University to restore to petitioner any course credits she earned for the semester in question and, unless she is barred from reinstatement for valid academic reasons, to reinstate her as a student in the graduate program.

Reversed and remanded.

MR. CHIEF JUSTICE BURGER, dissenting.

I join the dissent of JUSTICE REHNQUIST which follows and add a few observations.

The present case is clearly distinguishable from the Court's prior holdings in *Cohen, Gooding,* and *Rosenfeld,*

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paper and to the organization on the front page of the cartoon and the headline, rather than to the manner in which the newspaper was disseminated. 331 F. Supp., at 1325, 1328, 1329, 1330, 1332. As the Court of Appeals opinion states, "[t]he facts are not in dispute." 464 F. 2d, at 138. The charge against petitioner was quite unrelated to either the place or manner of distribution. The Dean's charge stated that the "forms of speech" contained in the newspaper were "improper on the University campus." *Id.*, at 139. Moreover, the majority below quoted without disapproval petitioner's verified affidavit stating that "no disruption of the University's functions occurred in connection with the distribution." *Id.*, at 139–140. Likewise, both the dissenting opinion in the Court of Appeals and the District Court opinion refer to this same uncontroverted fact. *Id.*, at 145; 331 F. Supp., at 1328. Thus, in the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression.

as erroneous as those holdings are.* *Cohen, Gooding,* and *Rosenfeld* dealt with prosecutions under criminal statutes which allowed the imposition of severe penalties. Unlike such traditional First Amendment cases, we deal here with rules which govern conduct on the campus of a state university.

In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.

I find it a curious—even bizarre—extension of *Cohen, Gooding,* and *Rosenfeld* to say that a state university is impotent to deal with conduct such as that of the petitioner. Students are, of course, free to criticize the university, its faculty, or the Government in vigorous, or even harsh, terms. But it is not unreasonable or violative of the Constitution to subject to disciplinary action those individuals who distribute publications which are at the same time obscene and infantile. To preclude a state university or college from regulating the distribution of such obscene materials does not protect the values inherent in the First Amendment; rather, it demeans those values. The anomaly of the Court's holding today is

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Cohen v. *California,* 403 U. S. 15, 27 (1971) (BLACKMUN, J., with whom BURGER, C. J., and Black, J., joined, dissenting); *Gooding* v. *Wilson,* 405 U. S. 518, 528 (1972) (BURGER, C. J., dissenting), 534 (BLACKMUN, J., dissenting); *Rosenfeld* v. *New Jersey,* 408 U. S. 901, 902 (1972) (BURGER, C. J., dissenting), 903 (POWELL, J., dissenting), 909 (REHNQUIST, J., dissenting).

suggested by its use of the now familiar "code" abbreviation for the petitioner's foul language.

The judgment of the Court of Appeals was eminently correct. It should be affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

We held in *Healy* v. *James*, 408 U. S. 169, 180 (1972), that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." But that general proposition does not decide the concrete case now before us. *Healy* held that the public university there involved had not afforded adequate notice and hearing of the action it proposed to take with respect to the students involved. Here the Court of Appeals found, and that finding is not questioned in this Court's opinion, that "the issue arises in the context of a student dismissal, after service of written charges and after a full and fair hearing, for violation of a University rule of conduct." 464 F. 2d 136, 138.

Both because I do not believe proper exercise of our jurisdiction warrants summary reversal in a case dependent in part on assessment of the record and not squarely governed by one of our decisions, and because I have serious reservations about the result reached by the Court, I dissent from the summary disposition of this case.

I

Petitioner Papish has for many years been a graduate student at the University of Missouri. Judge Stephenson, writing for the Court of Appeals in this case, summarized her record in these words:

> "Miss Papish's academic record reveals that she was in no rush to complete the requirements for her grad-

uate degree in Journalism. She possesses a 1958 academic degree from the University of Connecticut; she was admitted to graduate school at the University of Missouri in September in 1963; and although she attended school through the fall, winter, and summer semesters, she was, after 6 years of work, making little, if any, significant progress toward the achievement of her stated academic objective. At the time of her dismissal, Miss Papish was enrolled in a one-hour course entitled 'Research Journalism' and in a three-hour course entitled 'Ceramics 4.' In the semester immediately preceding her dismissal, she was enrolled only in 'Ceramics 3.' " 464 F. 2d, at 138 n. 2.

Whatever may have been her lack of ability or motivation in the academic area, petitioner had been active on other fronts. In the words of the Court of Appeals:

"3. On November 1, 1967, the Faculty Committee on Student Conduct, after notice of charges and a hearing, placed Miss Papish on disciplinary probation for the remainder of her student status at the University. The basis for her probation was her violation of the general standard of student conduct . . . . This action arose out of events which took place on October 14, 1967 at a time when the University was hosting high school seniors and their parents for the purpose of acquainting them with its educational programs and other aspects of campus life. She specifically was charged, *inter alia*, with openly distributing, on University grounds, without the permission of appropriate University personnel, two non-University publications of the Students for Democratic Society (SDS). It was alleged in the notice of charges, and apparently established at

the ensuing hearing, that one of these publications, the *New Left Notes*, contained 'pornographic, indecent and obscene words, "f---," "bull s---," and "sh--s." ' The notice of charges also recites that the other publication, *The CIA at College: Into Twilight and Back*, contained 'a pornographic and indecent picture depicting two rats apparently fornicating on its cover . . . .'

"4. Some two weeks prior to the incident causing her dismissal, Miss Papish was placed on academic probation because of prolonged submarginal academic progress. It was a condition of this probation that she pursue satisfactory work on her thesis, and that such work be evidenced by the completion and presentation of several completed chapters to her thesis advisor by the end of the semester. By letter dated January 31, 1969, Miss Papish was notified that her failure to comply with this special condition within the time specified would result in the termination of her candidacy for a graduate degree." *Id.*, at 138–139, nn. 3, 4.

It was in the light of this background that respondents finally expelled petitioner for the incident described in the Court's opinion. The Court fails to note, however, two findings made by the District Court with respect to the circumstances under which petitioner hawked her newspaper near the memorial tower of the University:

"The Memorial Tower is the central unit of integrated structures dedicated to the memory of those students who died in the Armed Services in World Wars I and II. Other adjacent units include the Student Union and a Non-Sectarian chapel for prayer and meditation. Through the Memorial Arch pass parents of students, guests of the University, stu-

dents, including many persons under 18 years of age and high school students." 331 F. Supp. 1321, 1325 n. 4.

"The plaintiff knowingly and intentionally participated in distributing the publication to provoke a confrontation with the authorities by pandering the publication with crude, puerile, vulgar obscenities." *Id.*, at 1325.

II

I continue to adhere to the dissenting views expressed in *Rosenfeld* v. *New Jersey*, 408 U. S. 901 (1972), that the public use of the word "M-----f-----" is "lewd and obscene" as those terms were used by the Court in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). There the Court said:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571–572.

But even were I convinced of the correctness of the Court's disposition of *Rosenfeld*, I would not think it should control the outcome of this case. It simply does not follow under any of our decisions or from the language of the First Amendment itself that because peti-

tioner could not be criminally prosecuted by the Missouri state courts for the conduct in question, she may not therefore be expelled from the University of Missouri for the same conduct. A state university is an establishment for the purpose of educating the State's young people, supported by the tax revenues of the State's citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contained the language described in the Court's opinion is quite unacceptable to me, and I would suspect would have been equally unacceptable to the Framers of the First Amendment. This is indeed a case where the observation of a unanimous Court in *Chaplinsky* that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" applies with compelling force.

III

The Court cautions that "disenchantment with Miss Papish's performance, understandable as it may have been, is no justification for denial of constitutional rights." Quite so. But a wooden insistence on equating, for constitutional purposes, the authority of the State to criminally punish with its authority to exercise even a modicum of control over the university which it operates, serves neither the Constitution nor public education well. There is reason to think that the "disenchantment" of which the Court speaks may, after this decision, become widespread among taxpayers and legislators. The system of tax-supported public universities which has grown up

in this country is one of its truly great accomplishments; if they are to continue to grow and thrive to serve an expanding population, they must have something more than the grudging support of taxpayers and legislators. But one can scarcely blame the latter if, told by the Court that their only function is to supply tax money for the operation of the university, the "disenchantment" may reach such a point that they doubt the game is worth the candle.